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SOLICITORS' JOURNAL

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Legal Aid

WITH the establishment of the legal advice scheme last Monday we could be excused for congratulating ourselves that the greater part of the purposes of the Legal Aid and Advice Act, 1949, had been achieved. Unhappily in the events which have happened this is not so, because, owing to the fall in the value of money since 1950 and the failure to revise the Assessment of Resources Regulations, large numbers of people for whose benefit the Act of 1949 was passed are being deprived of its help. This process of edging out beneficiaries has been gradual and until recently we have not thought it right to press for revision in view of the financial difficulties under which we were labouring. The situation is different to-day. Within the next few weeks the CHANCELLOR OF THE EXCHEQUER will present a Budget in which he will be able to let go of some money. It is natural that most of us who pay heavy taxes should want him to let us keep more of our own money by reducing income tax, surtax, purchase tax and any other tax which each of us individually happens to pay. All solicitors who handle litigation are aware of cases where the present regulations bear hardly and cause injustice. In our view the Opposition were right to raise the question in the Commons last week and we are sorry that the ATTORNEY-GENERAL was unable to give more than a stalling reply. We agree that when limited funds are available one has to decide between amending and extending the application of the scheme and we concede that there is room for differences of opinion about priorities. The amount of money which would be needed to put the whole of the scheme into operation and also to revise the means test to bring it into line with present conditions is so comparatively small and the financial condition of the country is so comparatively good that in this matter the need for careful selection no longer exists. Whether we should go one step further and let the Legal Aid Fund assume responsibility for the costs of a successful unassisted defendant may be arguable although we have no doubt that morally it is right that it should. Having said all this, we acknowledge that the Chancellor of the Exchequer is subject to many pressing demands and we certainly do not underestimate the value of the developments in legal aid and advice which he has made possible.

Variation of Trusts

THE first fruits resulting from the widening of the court's power to vary settlements under the Variation of Trusts Act, 1958, are now being gathered. Some useful guidance has been given by the court in exercising its discretionary power

CONTENTS

to approve variations submitted. Mr. Justice VAISEY has indicated that in respect of applications to vary investment clauses two possible courses are open. Either a few words may be added to the existing clause retaining all that was worth saving of the existing range of choice; or the whole investment clause could be redrafted, excluding any obsolete matter and adding new powers. His lordship considered that in the majority of cases the most convenient course was to produce a new clause containing the appropriate enlargement (*Re Byng's Will Trusts, The Times*, 25th February). In *Re Steed's Will Trusts* (*The Times*, 26th February), Mr. Justice HARMAN has explained that the 1958 Act does not enable beneficiaries to override the discretion of trustees which the trustees desired to exercise. Where trustees are properly exercising their discretion, the court has no power to overrule them or take the discretion out of their hands. These judicial observations, uttered so soon after the passing of the Act, should be of great assistance to the many lawyers now considering making applications to the court under the Act.

County Court Costs

WHERE the only relief claimed in an action in the county court is the payment of money, Ord. 11 (1) of the County Court Rules, 1936, provides that the defendant may, within eight days of the service of the summons on him inclusive of the day of service, pay into court in satisfaction of the claim the whole or part of the amount of the claim and the costs stated on the summons or, where only part of the amount claimed is paid into court, the amount which would have been entered on the summons for that sum. However, it would seem that this is not the case where there is a payment into court of less than the whole amount and liability is denied. The question arose in *Allott* v. *Wagon Repairs, Ltd.* (1959), unreported (the case was noted briefly in *The Times* on 27th February) and the Court of Appeal held that in these circumstances the plaintiff, in accepting the amount paid into court, is entitled to taxed costs on the appropriate scale and is not limited to the costs stated on the summons or the costs which would have been entered on the summons in respect of the lesser amount.

Recognition of Revenue Laws

IT cannot now be doubted that, on the ground of illegality, the courts will refuse to enforce a contract if the real object and intention of the parties necessitates their joining in an endeavour to perform in a foreign and friendly State some act which is illegal by the law of that State. Authority for this principle may be found in the well-known case of *Foster* v. *Driscoll* [1929] 1 K.B. 470, a case which was expressly approved by the House of Lords in *Regazzoni* v. *K. C. Sethia* (1944), *Ltd.* [1957] 3 W.L.R. 752, but, as Lord Mansfield said in *Holman* v. *Johnson* (1775), 1 Cowp. 341, "no country ever takes notice of the revenue laws of another." Points similar to these arose in rather unusual circumstances in *Re Emery's Trusts* (1959), *The Times*, 28th February, where it appeared that a husband, a non-resident alien of the United States, had bought some shares in the name of his wife, an American citizen. The husband claimed that there was sufficient evidence to rebut the presumption of advancement and, therefore, that the shares were held by his wife in trust for them both jointly. However, WYNN PARRY, J., decided that the action should be dismissed as the husband had transferred the shares into his wife's name with a view to avoiding the payment of a withholding tax on the dividends, a tax which the wife, as a citizen of the United States, was not liable to pay. For this reason the court, a court of equity, would not assist the husband to rebut the presumption of advancement. Although the courts will not enforce the revenue laws of another country (see, e.g., *Government of India* v. *Taylor* [1955] 2 W.L.R. 303), as their lordships stressed in *Regazzoni's* case, public policy or international comity demands that they should recognise or take notice of them. In *Re Emery's Trusts, supra*, the court would not help the husband to establish a trust because, to use the phrase employed by Blackburn, J., in *Waugh* v. *Morris* (1873), L.R. 8 Q.B. 202, he had a "wicked intention to break the law," albeit a revenue law, of a foreign and friendly State.

Sir David Hughes Parry

AT the end of the present academic year Professor Sir DAVID HUGHES PARRY is retiring from his academic appointments at the London School of Economics and Political Science and the Institute of Advanced Legal Studies of the University of London. Sir David was the Editor of this journal for three years from 1925 to 1928 and for this reason we have always had a special interest in his academic career. He joined the Department of Law at the London School of Economics in 1924 and has had a strong influence on the development of legal education during the past thirty-five years. There are many solicitors who have sat at Sir David's feet and remember him with affection and his work with respect. His closest associates have decided to organise a tribute to him on his retirement. This will take the form of a portrait bust, one cast of which will be placed at the London School of Economics and the other at the Institute of Advanced Legal Studies; it is hoped that the funds will be enough to pay for an additional cast to be presented to Sir David himself and to establish an annual book prize to be known as the Hughes Parry Prize. The treasurer of the fund is Professor L. C. B. GOWER who will be pleased to receive contributions at the London School of Economics, Houghton Street, London, W.C.2. Cheques should be made payable to Professor Gower and crossed "Parry Fund."

De Jure Recognition of "Hampshire"

THE MINISTER OF HOUSING AND LOCAL GOVERNMENT has given his consent under s. 59 of the Local Government Act, 1958, to the name of the Administrative County of Southampton being changed to Hampshire with effect from 1st April next. The change of name will not affect any rights or obligations or render defective any legal proceedings, which may be commenced or continued as if there had been no change of name (*ibid.*, s. 59 (4)). Whilst congratulating the authorities concerned on adopting the shorter and popular description, we wonder how long it has taken to obtain this sensible decision. Loyalty and affection for Hampshire can easily be appreciated; but how difficult it must be to be attached to the Administrative County of Southampton when Southampton itself is a town and county of a town in its own right and a county borough as well. We wish the best of good fortune to Hants in its old yet new name.

STAMP DUTY REFORM

By **B. J. SIMS, LL.B.**

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At this time of the year it is customary for representative bodies and numerous individuals to make suggestions for the reduction of taxation, and its reform, in the forthcoming Budget to be introduced by the Chancellor of the Exchequer.

Generally speaking, the interest is directed mainly to income tax, surtax, profits tax and estate duty. It is believed however that currently there is an awakening of interest in stamp duties. They were imposed first in the reign of William and Mary by the Stamp Act, 1694, and the present law is based on the Stamp Act, 1891. It is hardly surprising that a system based on an Act of Parliament nearly seventy years old should have become somewhat outmoded and be considered a ripe subject for reform.

The increasing interest in the subject is undoubtedly due to the greatly increased rates of duty in recent years (particularly since 1947) and the expertise of stamp duty avoidance which now flourishes. Conveyancers and company law specialists pay much more attention to the charge of stamp duty when drawing up documents and schemes than ever before, and it has become a recognised part of so-called tax planning.

In the past decade there has been far greater interest taken in the substantive law of stamp duty. It is now a compulsory subject for The Law Society's final examination. Enlarged editions of the two standard works, and two new text books, have been published, and articles and practice notes on stamp duty appear regularly in the legal periodicals. The contemporary law reports contain more decisions on questions of stamp duty than they have done for a long time past.

Nor has the Legislature been entirely silent. The Finance Act, 1949, abolished many of the more archaic and less important heads of charge. However, it was a comparatively small bite at the cherry. What remains to be done?

Difficulty of reform

Although there is a body of opinion in favour of a complete abolition of stamp duty, it must be appreciated that although small it is not altogether a negligible revenue producer. The 101st Report of the Commissioners of Inland Revenue for the year ended 31st March, 1958, recently published, reveals that the net receipt by the Exchequer for 1957–58 from stamp duties amounted to £63,521,482. Any Chancellor of the Exchequer would perhaps hesitate before seeking to abolish the duty entirely. There is, however, a strong body of opinion in favour of the reform of stamp duty on certain topics.

It is difficult to see how any reform of stamp duty can be general or fundamental because of the curious nature of its structure. The Stamp Act, 1891, contains a heterogenous collection of various heads of charge on numerous kinds of *documents* as distinct from *transactions*. Liability depends on whether or not a document falls within any particular head of charge, and, of course, sometimes a document is capable of falling under more than one. It has been aptly stated judicially: "The law upon the subject of stamps is altogether a matter *positivi juris*. It involves nothing of principle or reason but depends altogether on the language of the legislature" (*Morley* v. *Hall* (1834), 2 Dowl. 494; see Sergeant on Stamp Duties, 3rd ed., p. 2). It differs thus very much from income tax and estate duty in which there is always a fundamental principle involved, i.e., whether a receipt is capital or income, or whether the property passed on the death or not.

It is hardly to be wondered, therefore, bearing in mind these points and the age of the legislation, that there should be revealed now some anomalies, and that stamp duty should be such a fruitful source of operation for the modern tax avoiders and their advisers.

Inadequate enforcement provisions

The provisions for enforcement of stamp duty are somewhat inadequate. For example, the fines and penalties for non-compliance with the stamp law are ridiculously low by comparison with the amount often at stake and they are in striking contrast with the very severe penalties exigible under the Income Tax Act, 1952. In this connection it is difficult to resist the conclusion that if the stamp law is to be effective (and surely as a matter of principle all revenue legislation should be so) much heavier penalties and severer sanctions are called for.

Although, for the reasons given above, any radical or far-reaching alteration in the system of stamp duty seems too much to hope for at present, it is suggested that some at least of the following beneficial changes could be effected with comparative simplicity.

1. *Relief for small share transfers*

The reduced rate relief for small landed property transfers should be extended to small stock and share transfers.

The principle of reduced rate relief has been accepted to assist the small house purchaser. It is also the avowed intention of the Government to help the small investor and it seems difficult to see why the two types of saver should be treated differently.

2. *Stamp duty on short leases*

At present duty is chargeable at 2 per cent. of the annual rent on any lease or tenancy agreement for a term falling between one and thirty-five years, where the annual rent is over £100.

As regards flats and other residential premises, leases and tenancies at rack rents are generally granted for terms of much less than thirty-five years. The average tenant has therefore to pay stamp duty several times over during the corresponding period. There appears to be no reason why some provision could not be made in such cases for the duty to be levied on a scale somewhat similar to that existing for small conveyances on sale. A suggestion as to how a sliding scale could operate was made in "Current Topics" on 15th November last (102 Sol. J. 815).

3. *Anomalies in the relief for transfers between associated companies*

The provisions granting relief from stamp duty to inter-connected company transfers under s. 42 of the Finance Act,

1930, as amended, are extremely complicated and full of potential dangers for a practitioner if he does not observe strictly the letter of the law.

There are two anomalous consequences of the present law contained in s. 42, *ibid.* A conveyance from a parent company to a sub-subsidiary company, or *vice versa*, does not qualify for relief, notwithstanding that the parent company owns not less than 90 per cent. of its subsidiary's share capital and that company owns not less than the same proportion of the capital of the sub-subsidiary company. Again, no relief can be obtained on a conveyance between a subsidiary in a group of companies and a sub-subsidiary company of another subsidiary in the group, the respective shareholders of which themselves satisfy the requirements of s. 42. The Council of The Law Society have pressed for a removal of these anomalies (see *Law Society's Gazette*, January, 1958, p. 31). It is to be hoped that their representations will lead to an early change in the law.

THE HIGHWAY BILL

THIS major measure—311 clauses and 26 schedules, covering 299 pages and priced at 12s. 6d.—was introduced in the House of Lords on 20th January, 1959, on the recommendation of a detailed Report (Cmnd. 630, H.M.S.O., 9s.) of a Committee appointed barely a year ago by the Minister of Housing and Local Government and the Minister of Transport and Civil Aviation. The Bill is primarily a consolidation one; no less than 55 statutes, 2 statutory orders and the "model clauses" are referred to so often in the side-notes to the Bill by way of clauses to be repealed as to be given abbreviated titles. In addition, however, the Committee have made a number of proposals in the Bill for definite, if minor, amendments of the law. Some of these amendments are little more than drafting improvements—and in this subject there is plenty of room for improvement. The law was last consolidated in 1835, when the roads of this country were very different from their present condition, and since 1835 successive Parliaments have tinkered with the subject and in many cases provisions overlap and duplicate one another. Some provisions are to be found in the Highway Acts and others in the Public Health Acts; in more recent years the position has been further complicated by the Town and Country Planning Act, 1947, the National Parks and Access to the Countryside Act, 1949, the Special and Trunk Roads Acts, and the New Streets Acts of 1951 and 1957. However, the consolidating work of the Committee, as demonstrated by the present Bill, has been confined to the statutes relating to highway administration, as distinct from the regulation of road traffic. The Road Traffic Acts are therefore left outside the Bill, as are the powers given to local authorities under several statutes to provide seats, public conveniences, bus shelters, etc., and for the naming and numbering of streets, which are regarded as matters of town government. Adoptive Acts consolidated in the Bill are to be made of general application, and a few of the model clauses (1957 edition) which were regarded by the Committee as being uncontroversial are also included in the Bill.

However, apart altogether from amendments in the law of a purely drafting nature, or primarily being matters of form, the Bill will also make quite a number of amendments which will be more substantial. These amendments are claimed by the Committee to fall within their terms of reference, "to improve the form of the law or for the removal of anomalies, inconsistencies and ambiguities, for abrogating provisions which are obsolete or otherwise unnecessary or for modernising procedure," and none of them embody "an amendment of the law of such importance that it ought to be separately enacted." None the less, the amendments proposed will not all be so trivial as to be unworthy of comment. All of them will, it is confidently claimed, improve this muddled and confusing branch of our "jurisprudence," and as one reads the report and the Bill, one can only be astonished at, and admire, the erudition and industry of the members of the Committee.

It is now proposed to comment briefly on the major amendments proposed.

A. Highway authorities

Under the existing law some highway powers are vested in the local authority—the county, borough or urban district council—and others (in the case of trunk roads) are vested in the Minister of Transport and Civil Aviation. In not all cases are highway powers vested in the highway authority as such. The Bill will clear these complications by providing firstly that the authority responsible for the maintenance of a road shall be the highway authority for that road—in fact they are made subject to an express duty to maintain that highway following s. 149 of the Public Health Act, 1875 (see cl. 44 (1)). Secondly, the Bill clearly defines *which* highways are highways maintainable at public expense (a new expression taking the place of the old "repairable by the inhabitants at large") in cl. 38, and then prescribes the authorities which are to be the highway authority for particular types or classes of highway (see cl. 1). Finally, it is made clear (also in cl. 1) that the borough or urban district council shall be the highway authority for all highways *not* maintainable at public expense in their area and the county council shall be the authority for such highways in a rural district.

Incidentally, the somewhat odd concept invented by the Public Utilities Street Works Act, 1950, "prospectively maintainable highways," which need not be formed roads at all (see definition of "street" in s. 1 (3) of the 1950 Act), is left alone, as the Bill does not profess to deal with the 1950 Act.

B. Maintainable highways

Clause 38 will define with some precision which highways are to be repairable at public expense, and the ghost of eighteenth-century local government, the liability of the "inhabitants at large" of a parish to maintain their highways is to be finally laid by cl. 38 (1). In place of the quaint procedure of indictment of the inhabitants at large—an unincorporated body—the express duty imposed on the highway authority to maintain a maintainable highway is to be enforceable at the instance of any person, by procedure instituted under cl. 59. The complainant will be entitled to serve a notice on the highway authority, in any case where he alleges that a maintainable highway or bridge is out of repair, requiring the highway or bridge authority to state whether they admit that (*a*) the way or bridge is a highway, and (*b*) they are liable to maintain it. If the complainant does not receive an affirmative reply to both these questions within one month, the complainant may apply to quarter sessions for an order

requiring the way or bridge to be put in proper repair within a reasonable period—provided, of course, the court find that the way or bridge is a highway which the authority are liable to maintain, and that it is out of repair. If the authority serve a notice on the complainant within one month admitting both the above matters, the complainant may then apply within six months to the local magistrates, who may, if they find the bridge or way is out of repair, order the authority to put it in proper repair within a reasonable period. If such an order, either of quarter sessions or of the magistrates, is not complied with at the end of the period specified, the magistrates may by order authorise the complainant " to carry out such works as may be necessary to put the highway in proper repair," and he will be able to recover any expenses reasonably so incurred from the authority summarily as a civil debt.

This procedure should work well in practice, as the adjudicating court is to be quarter sessions in those cases in which there is most likely to be any serious dispute, namely, where the authority contest the status of the highway in question. On the other hand, it is to be hoped that members of the public will not resort to the procedure too readily, as otherwise the members of the local authority, who are held responsible by their constituents for the expenditure of rate fund moneys, may find their discretion to select the order of priorities for road repairs in their district usurped by the accidents of court proceedings. The practice of serving notices, followed by action in default at the expense of the defaulter, is common enough in many branches of local government law, but always hitherto the local authority have been given the initiative, and they have not formerly been at the " receiving end " of such procedure.

C. Improvements

For the first time, cl. 64 would give highway authorities one comprehensive power to carry out improvements to highways maintainable at the public expense by them. This will not really be a new power, except that the clause will codify a number of existing provisions to be found scattered over a variety of statutes. The existing law as to improvement lines (Public Health Act, 1925, ss. 33 and 34)—extended to cover all districts regardless of adoption—building lines (Roads Improvement Act, 1925, s. 5), buildings in streets (Public Health (Buildings in Streets) Act, 1888, s. 3), and the improvement of corners and bends (Roads Improvement Act, 1925, s. 4), are repeated with minor improvements. Presumably the members of the Committee felt that a repeal of these provisions would go too far outside the province of a consolidating measure, but the new clauses do seem to perpetuate powers that are quite unnecessarily complicated, especially as highway authorities have been recommended by the Minister of Transport and Civil Aviation (see Circular 696 of that Ministry, dated 24th August, 1954) not to prescribe improvement lines and building lines in future, but to rely on the wider powers given by the Town and Country Planning Act, 1947.

D. Stopping up and diversions

The cumbersome and expensive procedure for the stopping up of a highway under ss. 84 to 93 of the Highway Act, 1835, whereby a certificate has to be obtained from two justices and then enrolled in quarter sessions is to be abolished, and a general power is to be given in replacement, taken from model cl. 43. After the giving of proper notices (see Sched. XII), the highway authority will be able to apply to the local magistrates under cl. 108 for a stopping up or diversion order on the ground that the highway is unnecessary or that it can be diverted so as to make it nearer or more commodious to the public; if the magistrates make an order, this has to be sent to the clerk of the peace, who thereupon (without any hearing) enrols the documents among the records of quarter sessions. This will not affect other existing powers for the stopping up and diversion of highways, such as those under the Town and Country Planning Act, 1947, or the Acquisition of Land (Authorisation Procedure) Act, 1946, and the procedure of ss. 42 to 44 of the National Parks and Access to the Countryside Act, 1949, with respect to the extinguishment or diversion of public paths is to be repeated in the Bill (see cll. 111 to 113).

E. New streets

The Acts of 1951 and 1957 are to be found, not in Pt. VIII (headed " New Streets "), but, more logically, in Pt. IX (headed " Making up of Private Streets "), as the " Advance Payments Code "; what Pt. VIII does contain are the provisions replacing s. 157 of the Public Health Act, 1875, and the related provisions of the Public Health Act, 1925. In particular, s. 30 of the 1925 Act has been completely re-drafted and a number of the ambiguities in the existing law are to be clarified (see cl. 158). It is made clear that a strip of land left unbuilt-on as a consequence of a " new street order " becomes part of the highway once work for the erection of a new building is commenced on land adjoining the strip. The existing section provides that a new street order merely has the effect of applying the local authority's new street byelaws to that street; under the new clause the effect is much more clearly stated, in that the local authority will be enabled by the order to prescribe the centre line of the new street and outer lines defining the minimum width thereof; indeed, the expression " declare the highway to be a new street " does not appear in the new clause at all (except by inference in the side-note). By this new power, the local authority should in future be able to ensure that development will be carried out in such a manner as to result in a street of proper and uniform width, and (see Report, p. 125) avoid " zig-zagging."

F. Private street works

The private street works legislation is repeated virtually unaltered, except that it is made clear that the powers of either the Private Street Works Act, 1892, or s. 150 of the Public Health Act, 1875, may be exercised in relation to any part of a street, " whether a complete cross-section, a longitudinal strip (e.g., a footway along one side only), or any other part, and that where this is done the frontagers on both sides of that length of the street in which the part in question is situated can be charged " (Report, p. 129). The 1892 Act forms a group of clauses (173 to 187), described as the " Code of 1892," and cll. 188 to 190 are the " Code of 1875." The form of the notices to be served and the method of publication are also simplified in the case of the Code of 1892: see Sched. XV. Those districts at present applying the 1892 Act, or the 1875 Act (or local legislation), as the case may be, will be regulated by the corresponding clauses of the Bill. The rest of Pt. IX consists of the " Advance Payments Code" (above), clauses common to both 1875 and 1892 procedure (including the procedure by way of complaint to the Minister), and emergency works (Public Health Acts Amendment Act, 1907, s. 19). Section 48 of the Town and Country Planning Act, 1947, is also replaced (cl. 205), and cl. 208 will bring into the general law the very useful model cl. 42, aimed at the prevention of evasion of private street works expenses

by owners. This well-known clause meets the case of an owner who transfers his property, or a portion of it, to a "man of straw" for the purpose of evading the payment of private street works expenses.

Conclusion

It will be noticed that there is nothing in the Bill about the abolition of the doctrine of "non-feasance," or more strictly, the doctrine whereby a highway authority are not liable for accidents or injury caused by the failure of the authority to keep a highway maintainable by them in repair, as distinct from cases where they have undertaken repairs or improvements and the work has been done negligently. This special defence—available only to highway authorities—is expressly saved by cl. 297 of the Bill. It is understood, however, that discussions are now in progress between The Law Society and the local authority associations, and other interested bodies, on this very point. No doubt the abolition of this somewhat anomalous doctrine will be one of the more important clauses of the next (amending) Highway Bill.

It is quite impossible here to mention all the minor improvements of the law that will be effected when the present Bill becomes law, but it is clearly of great importance and worthy of study by most solicitors. There are certain dangers in too hasty a reading of the Bill's provisions, in that many of the clauses are sufficiently like the existing law for one to be able—wrongly in some instances—to assume that there has been no alteration of the law. Consolidating Bill this certainly is, but it is not consolidation of the literal kind that we experienced recently in the Housing Acts of 1957 and 1958.

J. F. GARNER.

THE CHANGING RELATIONSHIP BETWEEN MASTER AND SERVANT—II

EXTENDING "THE COURSE OF EMPLOYMENT"

THE Inter-Departmental Committee who recently reported on the case of *Lister* v. *Romford Ice and Cold Storage Co.* [1957] A.C. 555 came to the conclusion that, as a general rule, employers and their insurers who were obliged under their vicarious liability to pay damages for injuries caused to third parties by the negligence of their servants did not claim indemnity for themselves from those servants. In the previous article it was suggested that this unwillingness to enforce legal rights was due to social and economic pressures. A consideration of recently decided "course of employment" cases shows that the changing social conscience of the nation is influencing our courts to extend the scope of the employer's duties to his servant acting in the course of his employment, and to pin liability on the employer if reasonably possible, thus entitling the injured party to compensation.

Two difficult situations

Difficulties of interpreting the term "course of employment" usually occur in two situations. On the one hand, where the workman does some work which he is appointed to do, but does it in a way which his master would not have authorised had he known of it, the master is nevertheless responsible, for the servant's act is still within the scope of his employment. But on the other hand, if the servant is employed only to do a particular job or class of work, and he does something outside the scope of that work, the master is not responsible for any mischief which the servant may do to a third party. The facts are often such that it is difficult to distinguish between these two situations, and the criterion is whether the act which is unauthorised is so connected with acts which have been authorised that it may be regarded as one mode (albeit an improper one) of doing the authorised act, or whether the unauthorised act is a distinct and independent act for which the employer is not responsible.

Defining the limits of liability

A further complication occurs where the limits of duty of the servant are not precisely defined, and here it is easier to treat the act of the servant as a mode of doing his work, rather than to treat it as an independent act for which the master will not be liable. In the cases of *London County Council* v. *Cattermoles (Garages), Ltd.* [1953] 1 W.L.R. 997 and *Mulholland* v. *Reid and Leyes, Ltd.* [1958] S.L.T. 285 (where the earlier decision was commented upon with approval) the duties of the servant were not clearly delimited, and in both cases the employers were held liable.

In *Cattermoles*, the servant had been employed in a general capacity as a garage hand, part of his duty being to move cars in the garage so as to make way for other cars. He was instructed to move the cars by pushing them, not by driving them, which his employers forbade him to do. While moving a car, the servant drove it on to the roadway where it caused a collision. It was held that this excursion on to the roadway was incidental to the servant's employment; notwithstanding that he performed the act in a way which was wrongful and was in fact forbidden, the act was one performed during the course of employment for which the employers were liable. The fact that the act of driving the cars had been forbidden to the servant did not alter the position, or afford any defence to the employers, because that act was merely a mode of doing what the servant was employed to do.

Mulholland's case

In *Mulholland* v. *Reid and Leyes, Ltd, supra*, the servant was an apprentice in a firm of agricultural implement makers who was employed generally to assist the journeyman and to learn his trade. He had no authority to drive motor vehicles and did not have a licence, but he had not been expressly prohibited by his employers from driving. While moving a harrow yoke in his employers' premises, he found that the way was blocked by a motor van belonging to his employers. He attempted to drive the van out of the way, without protest from the journeyman who was supervising the operation. The van collided with another employee who was killed. The employers were held liable for the accident as having occurred during the apprentice's course of employment.

Counsel for the defendants attempted, but unsuccessfully, to distinguish *Mulholland's* case from that of *Cattermoles*. It was suggested that the class of work which the apprentice

was authorised to do was entirely unconnected with the driving of motor vehicles, whereas in *Cattermoles* the moving of vehicles was certainly part of the servant's activities. The Appeal Court held, however, that *Mulholland* was *a fortiori* in relation to *Cattermoles* in that in *Mulholland* there was no express prohibition on the servant, but merely an absence of authority. Lord Sorn suggested that, to have any hope of success, the employers would have had to delimit the scope of the apprentice's employment much more clearly.

Smoking during working hours

Another class of case arises where an accident is caused by an employee who smokes carelessly during working hours. Where the workman is actually doing the work he has been instructed to do, and at the same time negligently lights a cigarette which causes an explosion, then the employer is liable because the act of smoking is then considered to be an unauthorised mode of doing the work. This is what happened in *Jefferson* v. *Derbyshire Farmers, Ltd.* [1921] 2 K.B. 281 and in *Century Insurance Co.* v. *Northern Ireland Transport Board* [1942] A.C. 509, where the employer was held liable.

The employers were not held liable in the most recent case of illegal smoking, *Kirby* v. *National Coal Board* [1959] S.L.T. 7, which was an appeal to the First Division of the Court of Session. Several miners were injured by an explosion of fire damp in a coal mine. It was proved that the explosion had been caused by the lighting of a cigarette with a match in the "waste" to which one of the miners had retired when the conveyor belt was temporarily stopped to enable repairs to be done to the conveyor.

Decision in *Kirby's* case

It was argued on behalf of the employees in *Kirby's* case that the ignition of the fire damp had occurred during a legitimate break in work, and during such breaks the course of employment was not interrupted. In any event, smoking *per se* did not take a man outside the scope of his employment, which proposition was supported by the two cases referred to above. It was suggested, on the authority of *Cattermoles'* case, that an express prohibition did not affect the sphere of the servant's employment. Even where a miner smoked contrary to regulations, that did not affect the sphere of his employment. These arguments failed to persuade the court, and the employers were found not liable.

Giving the leading judgment, Lord Clyde said that it was not necessary to decide the case on any narrow ground, as there was "an accumulation of factors" which freed the employers from liability. These factors were mentioned by Lord Clyde in his summing up where he said: "There was no evidence at all to suggest that in going into the waste the man was doing anything in any way connected with the work he was employed to do. Further, it is established that he left his working place and went in there purely for his own purposes and for his own pleasure, i.e., to smoke a cigarette . . . His conduct in such circumstances I cannot regard as an unauthorised mode of doing the work he was employed to do: it seems to me to be clearly something which took him outside the scope of his employment. If so, the defenders are not in law responsible for the consequences of his act."

When does the day's work end?

Another aspect of this branch of employer's liability which has been considered recently in two cases is the question of when the course of employment finishes for the day. The leading authority is the old case of *Brydon* v. *Stewart* (1855), 2 Macq. 30, where Lord Cranworth suggested that the master was responsible for whatever the servant did during the course of his employment, according to a fair interpretation of the words *eundo, morando, redeundo*, i.e., while at the place of employment or while entering or leaving it. The interpretation of this phrase was considered in the recent case of *Staton* v. *National Coal Board* [1957] 1 W.L.R. 893, where the facts were as follows. The plaintiff's husband, who was employed by the defendants, died following an accident on the defendants' premises, where he was knocked down by a bicycle carelessly ridden by another employee of the defendants, named Townsend. Townsend had in fact completed his work for the day, had gone home for lunch, and was returning on his bicycle to the works pay office to draw his wages at the appropriate time. It was held that, in going to the pay office at this time and for this purpose, Townsend was still acting within the scope of his employment, and the defendants were therefore liable for his negligence. In giving judgment, Finnemore, J., said: "It seems to me to be wholly unrealistic to say that a man who has finished the manual work which he is employed to do and is walking across his master's premises to collect the wages which the master had contracted to pay him, and for which he has done the work, has ceased to be in the course of his employment. There has been nothing to break the course of his employment. He has not gone off on any frolic of his own; he has not begun to do something solely for his own interest, for I think it is in the interest of the employer as well as the employee that a workman should receive his wages and receive them at a convenient place and at a convenient time."

Injuries while leaving work

The course of a man's employment does not necessarily end when the hours of work have ceased. If the employee is injured while actually going to or from work—*eundo aut redeundo*, then the employer may be liable. In *Weaver* v. *Tredegar Iron and Coal Co., Ltd.* [1940] A.C. 955 the plaintiff was a miner who, when attempting to board a train at a private railway station, was accidentally pushed off the platform by the crush of fellow workmen and was injured by the approaching train. The station was controlled by the defendants and was for the use of their employees only. It was held that as the plaintiff was making use of the platform provided by his employers, and as he had no right to be there except by the conditions of his employment, the accident arose out of and in the course of his employment. Lord Atkin said, at p. 966: "There can be no doubt that the course of employment cannot be limited to the time and place of the specific work the workman is employed to do. It does not necessarily end when the down tools signal is given, or when the actual workshop where he is working is left. In other words, the employment may run on its course by its own momentum beyond the actual stopping place."

Further difficulties of interpretation

A similar sort of accident formed the subject of the recent Scottish case of *Bell* v. *Blackwood Morton & Sons, Ltd.* [1958] S.L.T. (Notes) 18. A woman, employed as a furnisher in a carpet mill, received an injury to her ankle when descending a staircase in the mill along with other employees at the end of the day's work. She claimed that as a result of being jostled in the crowd she missed her footing and sustained a fracture to her ankle, and she blamed the accident on her fellow employees who, she said, had rushed wildly down the staircase. It was argued that, as the day's work had ceased,

the other servants were no longer acting within the course of their employment. Lord Strachan said, with true native caution, that he was unwilling to dispose of the legal question without a further inquiry into the facts by way of proof, and that he was not prepared to hold that an employee could not be within the scope of his employment when his actual hours of work had ceased—a rather elliptical way of saying that the employers might still be liable.

Although the cases of *Staton* and *Bell* have extended the law, many questions still remain unanswered with regard to the time when "employment" is deemed to have finished for the day. Is the employee still within the course of his employment if he suffers an injury in the act of leaving his master's premises *after* having received his weekly wages? Is the time determined when he actually passes out of the works gates? Or is it determined when he stamps his card on the time clock? If the employees, during the day's work, decide upon a lightning strike, when does their employment cease? If the employees stage a sit-down strike, and remain at their posts but refuse to work, are they still within the course of their employment if an accident occurs?

Meals during work

Another difficult question may arise where a workman knocks off to have a meal during his work. Is he still acting within the course of his employment when he does so? In *Crook* v. *Derbyshire Stone, Ltd.* [1956] 1 W.L.R. 432 a lorry driver stopped at a wayside café and crossed one section of a dual carriageway on foot to get refreshment, an act done while he was employed and with his employer's permission, and in doing so occasioned an accident with a motor cyclist. It was held that the employer was not vicariously liable to the motor cyclist on the ground that the lorry driver was not discharging any duty to his employer at the time when the accident occurred. This decision may be contrasted with *Harvey* v. *R. G. O'Dell and Hudson; Galway, third party* [1958] 2 Q.B. 78, where a workman using his own motor cycle combination, as authorised by his employers, injured a fellow workman travelling as a passenger in the sidecar as the result of a collision. The workman was injured as he was returning to work after having obtained a meal, which was held to be fairly incidental to the work which he had been instructed to do.

There may be some grounds for distinguishing these cases on the ground that in *Harvey's* case the men were out on an all-day job and they were not given any instructions to take food, and therefore their journey for a meal was fairly incidental to their work. But in *Crook's* case the lorry driver was on a journey of about four hours' duration, and it was his practice (known to and permitted by the employer) to stop for refreshment *en route*. It is suggested that this stop for refreshment should have been considered as "fairly incidental" to the driver's employment. That this is logical is shown when other possibilities are considered; if the lorry driver had crossed the road to ask the way, or to get a tin of petrol, or if on returning from his meal he had seen someone attempting to make off with the lorry and had run across the road to stop him—in all these cases, if an accident had resulted, the driver would surely have been held to have been acting in the course of his employment, and the employer found vicariously liable.

The changing attitude

This brief survey of the recent cases shows that the term "course of employment" has been extended to cover the employee while he is coming to or going from work, when he is going to receive his pay after working hours, when he takes time off for a meal, and sometimes even when he smokes during working hours. It is suggested that this extension of the meaning of the term, which serves to increase the protection given to employees, forms part of a changing attitude towards the master-servant relationship. This change is underlined by the conclusion reached by the *Lister* v. *Romford* Committee to the effect that employers and insurers no longer choose to press legal claims for indemnity against employees, for fear of harming good industrial relations.

N. G.

CRIMINAL APPEALS: FIAT OR VETO?

Criminal appeals

DURING the long vacation, on the last day of his tenure of office, Lord Goddard, C.J., delivered a reserved judgment in *Smith* v. *Wyles* [1958] 3 W.L.R. 528; 102 SOL. J. 758—an appeal to the Divisional Court by way of case stated—at the end of which his lordship referred to the complexity of modern legislation and expressed his regret that, in the circumstances, decisions of the Divisional Court on criminal matters could not be appealed from. Sometimes, in fact, this barrier compelled the judges of that court to follow a precedent with which they did not agree. Accordingly, his lordship voiced the hope that one day decisions of the Divisional Court relating to a criminal cause or matter would be appealable either in the Court of Appeal or in the House of Lords. Not long afterwards the present Lord Chief Justice seized the earliest opportunity to endorse the hope of his illustrious predecessor (*Re Hastings* (*No.* 2) [1958] 1 W.L.R. 372; 102 SOL. J. 936).

The original provision prohibiting such appeals occurs in the same statute which created the Divisional Court (Judicature Act, 1873, s. 47), and has been re-enacted in a consolidating statute (Judicature Act, 1925, s. 31)—the very Act which, by s. 16, provides that an application to the Attorney-General under the Criminal Appeal Act, 1907, s. 1 (6), for a certificate authorising an appeal to the House of Lords from the decision of the Court of Criminal Appeal, should be made within seven days from the date of that decision. Now just as both the Court of Appeal and the House of Lords have consistently defeated every attempt to by-pass the above ss. 47 and 31 or to narrow their meaning (*De Demko* v. *Secretary of State for Home Affairs* [1959] 2 W.L.R. 231; p. 130, *ante*), so has the above s. 1 definitely laid down that the determination by the Court of Criminal Appeal of any appeal or other matter which it has the power to determine shall be final—unless either the prosecution or the defence obtain the certificate of the Attorney-General that the decision of that court involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought.

No doubt these measures spring from, *inter alia*, a deep-seated and widespread desire in this country to expedite and finalise litigation; for nothing is more alien to the policy

of our law or repugnant to our sense of fairness than the procrastinations which from time to time attend foreign criminal trials. Yet, since expedition and finality are not ends in themselves—but only means to secure justice—they ought, it is submitted, to be sacrificed if the ends of justice are served thereby. As we have seen, however, limits have been prescribed by Parliament, beyond which it is not possible to proceed; and the question arises—especially in view of the aforesaid opinions and hopes repeatedly expressed by the experienced steersmen of our criminal law: should not the procedure of appeals from the Court of Criminal Appeal to the House of Lords be altered? To help the reader answer this question two recent cases will be examined in some detail.

The Brighton police conspiracy

It will be recalled that five persons (three of whom were police officers) were recently tried at the Central Criminal Court for conspiracy, and that two of them were acquitted—one being the Chief Constable of Brighton. The charge was that over a number of years they conspired together and with other persons unknown to obstruct the course of public justice, in that the three officers concerned should act contrary to their public duty as police officers in relation to the administration of the law. The indictment contained only one count of conspiracy—unsupported by any substantive counts in respect of specific overt acts of conspiracy—although the prosecution adduced evidence as to about a dozen separate transactions involving corruption, which were in fact severally laid in separate counts in other indictments awaiting trial. But both before the preliminary hearing and at the trial the prosecution supplied the defence with a lengthy list of detailed particulars and undertook to be bound by it. The trial was protracted and complicated; the learned judge had to deal with various points of law, while the jury had to investigate a mass of facts disclosing a situation where inquiries and prosecutions were stifled, favour was shown to persons charged, and criminals were protected. Those of the accused who were convicted appealed on several grounds, including the fact that—in the course of his summing-up—the trial judge had flatly denied the existence in our law of the presumption of innocence. Stranger still, the Court of Criminal Appeal delivered two judgments (*R.* v. *Hammersley, Heath and Bellson* [1958] Cr. App. R. 207)—one on the questions of law and the other on the facts—in neither of which any reference was made to the presumption of innocence, although during the argument, Lord Goddard, C.J., expressed his agreement with the trial judge about its non-existence. "There is no presumption one way or the other," his lordship said. "He who asserts must prove" (*The Times*, 14th May, 1958).

R. v. *Spriggs*

This was a trial for capital murder where the defence sought to establish insanity at common law and/or diminished responsibility under the Homicide Act, 1957, s. 2 (1). The latter—virtually the main, if not the only, defence—was based on abnormality of mind, due to alleged arrested or retarded development of mind, and the following inherent causes: psychopathic personality, immature personality, gross personality disorder, emotional immaturity, and emotional and temperamental instability. When prosecuting counsel's submission that the evidence for the defence had disclosed neither insanity nor diminished responsibility was rejected, he adduced rebutting evidence. The only difference between the medical witnesses, however, was as to whether the degree of diminished responsibility in the defendant was substantial enough to be covered by the relevant provision.

In his reply to the final speech for the defence, counsel for the prosecution submitted, subject to the judge's correction, that the defendant's emotional state was irrelevant under the new law, having regard to the fact that his intelligence quotient was above the average. This meant that the statutory mental abnormality applied only when the evidence proved deficiency of intelligence, and not merely emotional instability and immaturity. The learned judge, however, did not deal with this submission in his summing up to the jury. As a matter of fact, his lordship merely recapitulated the evidence in detail, without referring any part of it to any of the alleged abnormalities or interpreting the law of diminished responsibility. Moreover, in the course of his summing up, his lordship read the subsection to the jury and on their retiring handed to them a copy of it, intimating at the same time that it was for them to determine whether the defendant suffered from abnormality of mind in accordance with its terms. The jury returned a verdict of guilty of capital murder, and the defendant was duly sentenced to death.

Abdication of judicial function

Spriggs' appeal, on the principal ground that the trial judge had failed to advert sufficiently or at all to prosecuting counsel's interpretation of the law of diminished responsibility, was dismissed, and Lord Goddard, C.J., said in delivering the judgment of the Court of Criminal Appeal: "... [we cannot see that] a judge dealing with this matter can do more than call the attention of the jury to the exact terms of the section Parliament has enacted and leave them to say whether, upon the evidence, they are satisfied that the case comes within the section or not. When Parliament has defined a particular state of things, as they have defined here what is to amount to diminished responsibility, it is not for judges to re-define or to attempt to define the definition. The definition has been laid down by Parliament and it is a question then for the jury ... They are ordinary men and women, and would not it only confuse them if one were to go into metaphysical and philosophical distinctions between what is emotion and what is intellect and matters of that sort?" ([1958] 2 W.L.R. 162; [1958] 1 All E.R. 300; 102 Sol. J. 89).

Now the supremacy of Parliament is too strongly entrenched these days for judges to venture to encroach on its authority; but the judicature must not abdicate its function of interpreting the law, while appearing to be merely bowing to the will of the Legislature. After all, reasonable interpretation—and our canons of construction are perfectly reasonable—implements that will rather than frustrates it. Again, it should not be difficult for a judge of the High Court to explain in ordinary, simple language the particular problem of diminished responsibility which a certain case presents, in the light of this or that part of the subsection. What is bound to confuse a jury is to go mechanically over the evidence without comment, and then mutely to give them the subsection at the end of the summing-up, especially as most probably parts of it would be irrelevant to their investigation. Has any judge ever burdened the jury with a copy of the M'Naghten Rules? Indeed, this is how Her Majesty's judges ended their answer to the third question put to them by the House of Lords: "... and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course, we think, is correct, *accompanied with such observations and explanations as the circumstances of each particular case may require*,"

Suggested reform

In each one of these two cases counsel for the defence sought to appeal to the House of Lords, but the Attorney-General refused to grant a certificate in either, although they both seem to fulfil the two prescribed requirements and accordingly appear to have deserved it. Had the chief law officer of the Crown acceded to counsel's requests, the highest tribunal in the land would have had an opportunity of clarifying the situation and giving a much-needed lead for future practice. For one thing, the concept of diminished responsibility has been imported from Scotland, and the law lords include among them Scottish jurists of eminence. For another, the presumption of innocence has been taken for granted in both English and Scottish jurisdictions, and it is highly desirable to have a reasoned and authoritative pronouncement about it one way or the other. The trouble is that one is not permitted to argue any point with or before the Attorney-General in an open court, nor does he give any reasons for his refusal. In this connection it is interesting to point out that a similar procedure obtained under s. 3 of the Newspaper Libel Act, 1881, which made the fiat of the Director of Public Prosecutions a condition precedent to a prosecution for libel in a newspaper. But for seventy years proprietors, publishers and editors of newspapers have been protected from arbitrary prosecution by s. 8 of the Law of Libel Amendment Act, 1888, which enacts that the order of a judge at chambers must be obtained, such an order, however, not being appealable (*Ex parte Pulbrook* [1892] 1 Q.B. 86; 36 SOL. J. 79). Why, then, not let an appellant, whose appeal (as distinct from application for leave to appeal) has been dismissed by the Court of Criminal Appeal, have the right to apply to a law lord for leave to appeal to the House of Lords?

J. Y.

Common Law Commentary

MEANING OF "RATES OF WAGES PAYABLE"

IN *Henry Boot & Sons, Ltd.* v. *London County Council* [1959] 1 W.L.R. 133; p. 90, *ante*, the Court of Appeal had the difficult task of deciding whether the expression quoted in the title to this article includes sums credited to employees as holiday pay, and only paid out to the employee on the occasion of his annual holiday.

The employee must surely regard these credits as all part of his emolument and consequently within the expression "wages" paid or credited for the work he does. But the problem arose between the employer, a building contractor, and the London County Council under a building contract, and we can understand that it is convenient for the employer or the county council to distinguish the basic sum paid for wages from other sums such as holiday credits, national insurance, fares, guaranteed time and so on. None the less, in principle all these are part of the man's wages and any convenient distinction on paper cannot disguise the nature of these payments.

In the building contract in question there was an "up and down clause," i.e., a clause allowing a change in the price of the work according to changes in "rates of wages payable." The changes had to be in conformity with agreements between associations of employers and trade unions, but no question on that point arose, since it was accepted that the increase in holiday credits which occurred during the course of performing the contract came within that category. It was, however, contended that such an increase was not an increase in "rates of wages payable" and as the "up and down clause" only referred to such increases the county council contended that the builders could not claim to charge the extra sums paid for the increased holiday credits.

Two particular points were put forward in support of the council's view: first, attention was called to cl. 59 of the contract, which dealt with payment for variations and specifically mentioned holiday payments as well as wages. The judge of first instance said that, as "rates of wages" in that clause expressly excluded payment of holiday wages, he thought it right to put the same meaning on the words "rates of wages" where they occurred in the "up and down clause." Lord Somervell pointed out that this argument was a two-edged weapon because one could ask why holiday payments were not specifically mentioned in the "up and down clause" to make clear that they were not included within the expression "rates of wages." In the court below Pilcher, J., who had found for the defendant, accepted the argument that cl. 59 helped to show the distinction between wages proper and wages including holiday pay. The more one considers this argument the more one feels that either edge of this two-edged weapon is about as sharp as the other; and the conclusion to be drawn is that cl. 59 does not help as not clearly indicating which meaning was intended.

Secondly, attention was called to correspondence between the county council and the London Master Builders Association, the purport of which was that the council took the view that the "up and down clause" no longer applied to holiday credits, whilst in their reply the London Master Builders Association indicated that they did not agree with this interpretation. Where there is ambiguity in a document one may look to extrinsic evidence to ascertain the intention of the parties, but no help is gained from evidence which merely tends to show that one party intended to place a particular meaning on words (*Grant* v. *Fletcher* (1826), 5 B. & C. 436). In this case the correspondence was of the latter type and so of no help. The county council could have altered the words of the clause to make clear what they wished it to cover but for some reason chose not to do so. On these grounds the Court of Appeal reversed the decision of Pilcher, J., and allowed the builder's claim for the increased rate of holiday credits as being part of the "rates of wages payable."

L. W. M.

Dr. G. B. A. COKER has been appointed Judge of the High Court of Lagos and the Southern Cameroons.

The Hon. THOMAS GABRIEL ROCHE, Q.C., has been appointed Recorder of the City of Worcester.

Mr. John Frederick Hatchard, solicitor, of Yeovil, left £33,846 (£31,962 net).

Mr. Thomas Melhuish Pulman, solicitor, of Taunton, left £61,908 (£60,850 net).

THE CONVERSION OF PRIVATE COMPANIES INTO PUBLIC COMPANIES

HAVING helped your clients to make the difficult decision to run their business as a private limited company (see 102 SOL. J. 114, 131 and 150), you may expect peace for a few years, but if the business prospers the day will come when the clients are back to ask, "What about a public company?"

In an ideal world the reasons for flotation of an existing business as a public company would be purely financial; the company might need more capital than the proprietors of the business could provide or borrow from private sources, or the shareholders might want to have a readier market for their shares. But in fact flotation is often advisable for quite different reasons, and these reasons are concerned with the dangers of surtax directions under s. 245 of the Income Tax Act, 1952, assets valuation for estate duty under s. 55 of the Finance Act, 1940, and charge of estate duty on the company under s. 46 of the Finance Act, 1940.

It is sometimes thought that flotation is a panacea against all these ills, but this is not quite true, and it is worth while examining each of the provisions separately to see the type of company to which it applies.

Surtax direction

Section 245 of the Income Tax Act, 1952, applies to a company under the control of not more than five persons, and for counting up to five there is a special kind of arithmetic by which the following groups are each reckoned as a single person:—

Relatives, within the limits of husband, wife, ancestor, lineal descendant, brother and sister;
Nominees and the person for whom they act;
Partners;
Beneficiaries of a trust;
Beneficiaries of a deceased's estate.

A company in which the public are substantially interested is excluded, and this means a company in which ordinary shares carrying at least 25 per cent. of the voting power are held by the public at the end of the company's accounting year in question, and during the course of that year have been dealt in and quoted on a stock exchange in the United Kingdom. It is this exemption which in practice usually covers public companies, but the fact remains that even a public company may be under the control of not more than five conglomerate persons, and it can be subject to a surtax direction if the public do not hold at least 25 per cent. of the ordinary shares, or those shares have not been dealt in and quoted during the year. On the other hand, a private company might, exceptionally, be under the control of more than five persons, and accordingly free from any possibility of surtax direction.

A subsidiary company is also excluded from s. 245, but by s. 256 (4) "subsidiary" has a very limited meaning for this purpose; the proviso to the subsection contains the word "deemed" three times in the first four lines, and is very difficult to construe, but the effect seems to be that a company only escapes the net as a subsidiary if it is controlled by a non-controlled company, *and* is *not* controlled by five or less of its other shareholders. This is not so contradictory as it sounds because there are several definitions of control for the purpose of surtax direction, and these are not always mutually exclusive. Thus control exists if five or fewer people together possess, or are entitled to acquire, the greater part of the share capital, or of the voting rights, or of the dividend rights; there is also a delightfully vicious circle by which one has to assume that the company is controlled, and assume that a surtax direction has been made, and if one finds that more than half the company's income could be apportioned to not more than five persons, then the company *is* controlled and a direction *can* be made.

Assets valuation for estate duty

Section 55 of the Finance Act, 1940, adopts the Income Tax Act definition of a controlled company but without the exclusion of subsidiary companies or companies in which the public are substantially interested.

Shares in a company controlled by five or less persons which pass on death may be valued, not on the ordinary open market basis as shares, but by reference to the value of the company's net assets, including goodwill. It is important to remember that before the section can apply there must not only be a controlled company, but also a deceased who had himself had control of the company at some time during the five years preceding his death. "Control" by the deceased has quite a different meaning from "control" by five or fewer persons, and important modifications were made to it by the Finance Act, 1954, but this is outside the scope of the present article.

Although the Income Tax Act exclusion of companies in which the public are substantially interested does not apply to s. 55, there is a corresponding provision in subs. (4) which covers most public companies. The section is not to impose an assets valuation on any shares of a class "as to which permission to deal has been granted by the committee of a recognised stock exchange in the United Kingdom and dealings in the ordinary course of business on that stock exchange have been recorded during the year ending with the death." If the shares passing on the death belong to a class quoted and dealt in, the quoted prices will be accepted for estate duty, but shares of other classes may still come under the assets basis of valuation. Indeed, the quotation of one class of shares may increase the estate duty valuation of the other classes, because the market value of the quoted shares will be deducted from the value of the company's net assets, and the balance will be apportioned to the unquoted shares.

Charge of estate duty on the company

Section 46 of the Finance Act, 1940, not merely calls for valuation of the company's assets, but actually charges them to duty, if the deceased had made a transfer of property, or a payment of money, to the company at any time, and has received benefits from the company during the five years preceding the death. The slice of assets charged to duty bears the same proportion to the total assets, as the benefits bear to the company's net income for the five years. Fortunately, the section is rarely invoked by the Revenue, but it constitutes a lurking danger, especially to the tax-avoider, and it can be applied even though no shares pass on the death.

Like s. 55, s. 46 applies to a controlled company, as defined by the Income Tax Act, but without the exclusion of subsidiary companies and companies in which the public are substantially interested. Unlike s. 55, there is no protection in cases where shares are dealt in on a stock exchange. The sole test is whether the company is under the control of five or fewer persons, and it is only by spreading the control that the adoption of public company status can avoid the operation of s. 46.

Practical considerations

These penalties, with which our revenue law has thought fit to discourage the ownership of shares in controlled companies, are factors to be taken into account when deciding on a flotation, but it is only occasionally that they are decisive factors. It is necessary to make sure first that the business is large enough to float; secondly, that the profits record and the general nature of the business are likely to interest the public, and finally, that the objects to be attained justify the expense and other disadvantages of conversion

At this stage expert advice should be taken. A finance house specialising in public issues will eventually have to sponsor the operation, and a preliminary discussion with one of these houses should be held as early as possible. In general terms the practical considerations are as follows:—

Size.—An annual net profit approaching £30,000 before taxation will usually be the minimum, but it is worth remembering the possibility of combining two smaller businesses in one public company.

Profits record.—There must be a consistent record of profits over a period of about ten years without undue fluctuations apart from those accounted for by national emergencies.

Nature of business.—Industries producing goods will appeal to the investor while those providing services will not. For this reason hotels are difficult to float, and so are all agency and brokerage businesses where goodwill is personal. Some industries, such as electronics at the present time, are more popular than others. But although personal goodwill is a drawback, continuity of successful management is essential, and the present managers should be prepared to enter into service agreements.

Expense and other disadvantages.—A rough guide to the total cost of a public issue would be 2½ per cent. of the amount involved, with a minimum of £10,000. The disadvantages to be taken into account are, increased publicity to comply with the Companies Act and stock exchange requirements, and loss or weakening of family control which inevitably leads to a gradual change in the nature of the business.

The machinery of conversion

When it has been decided to proceed, the necessary steps will be taken by the solicitors for the issuing house, but the company's solicitors will have every opportunity to co-operate in what will probably be for them several months of unusual and exciting work, involving great skill in timing. In particular, an exhaustive investigation of the history and trading records of the business will have to be undertaken, with the help of accountants and valuers, to provide the material for a prospectus or statement in lieu of prospectus.

The issue itself can be carried out by any one of three methods; to begin with, there is the classical method of a Public Issue, by which the company appeals directly to the public. A direct public issue should always be underwritten by the issuing house so that the company is saved from the risk, at any rate the financial risk, of an unsuccessful issue.

The second method is the Offer for Sale, and here the issuing house takes up the shares itself, and then offers them for sale to the general public. The effect is much the same as an underwritten issue direct to the public.

The third method is Placing, which is often the most appropriate for a family business. The issuing house takes up the shares, as in the offer for sale, but it then proceeds to "place" them with its own customers, thus saving the expense of underwriting. In order to obtain a quotation on a placing, an adequate number of shares must be made available to the jobbers in order that dealing may take place.

If the object is merely to obtain a quotation without at the same time raising fresh money from the public, this can be done by a rather simpler operation known as a Stock Exchange Introduction.

Change of status

In comparison with the steps to be taken in connection with the issue to the public and the obtaining of a quotation, the actual change to public company status is extremely simple. All that is needed is a special resolution altering the articles by removing at least one of the three restrictions which made the company a private one: the restriction of the right of transfer, the limit on the number of members, and the prohibition of any invitation to the public. In practice the opportunity will be taken to adopt at the same time new articles more suitable for a public company. Section 30 of the Companies Act, 1948, then requires the filing of a prospectus or statement in lieu of prospectus, within fourteen days of the date of the special resolution.

In fact the requirements of the Companies Act are less strict on the conversion of a private company than they are on the formation of a new public company. Sections 109, 130 and 181, dealing with restrictions on the commencement of business, the statutory meeting and report, and the qualification of directors and their consent to act, apply to new public companies, but not to converted private companies, and for this reason it has become common for a company intended to be public to be first formed as a private company and then converted.

J. P. L.

Councillor Traviss Carter, solicitor, of Lytham St. Annes, is to be the town's new mayor. He is a past president of the Blackpool and Fylde District Law Society.

Mr. A. E. James, Assistant Recorder of Coventry, has been appointed chairman of Coventry's Licensing Planning Committee, in succession to the late Mr. R. G. Leaf.

Mr. Trevor Lloyd Williams, solicitor, of Beaumaris, Anglesey, was married on 18th February at Valley, Anglesey, to Miss Ann Eleri Davies.

Mr. James Anthony Lemkin, solicitor, of London, N.W.8, has been selected by the Chesterfield Conservative and National Liberal Association as prospective Parliamentary candidate for the next General Election.

Mr. R. E. Woodward, deputy town clerk of Leicester, has been appointed clerk and executive officer of the Mersey Water Board.

Mr. Hugh C. Kelly, Clerk to the Magistrates at Rhyl for over twenty-eight years, has resigned.

Landlord and Tenant Notebook

COLLATERAL TERM IN BUSINESS TENANCY

THE first question which had to be determined in *Re No. 1 Albemarle Street* [1959] 2 W.L.R. 171; p. 112, *ante*, was whether a court could order the grant of a new lease (Landlord and Tenant Act, 1954, s. 29) which would include a term conferring a licence to exhibit advertising signs outside and beyond the demised premises; and when it had answered that question in the affirmative, the second question was whether, in the circumstances of the case, it should do so.

The applicants had held a lease of the second floor of a building at the corner of Albemarle Street and Piccadilly, London, W.1. The lease had run from 1937 to 1958. Before 1937, there had been four signs, advertising the lessees' products, attached to other parts of the building: three were between the ground floor and first floor, and one high up between the fourth and fifth floors. And while the tenth lessee's covenant forbade the lessees to affix upon the external walls of the demised premises any name, sign or placard except of such dimensions and in such manner and place or places (if any) as the lessors should in writing sanction, a provision which followed the forfeiture clause ran: "The lessors hereby authorise and permit the lessees to maintain during the continuance of this lease the advertising signs or such other signs as shall be approved by the lessors' surveyors in their present position facing Piccadilly and Albemarle Street outside the building of which the demised premises form part. . . ."

The lessees applied for the grant of a new tenancy which would repeat this provision, and the lessors (successors to the grantors of the expired lease) objected to its inclusion.

"In connection with the holding"

In support of their plea, the applicants relied first of all on s. 32 of the Landlord and Tenant Act, 1954. The first subsection says that, subject to what follows, an order for the grant of a new tenancy is to be an order for the grant of a new tenancy of the holding; the second deals with the special case of the holding including other property; by the third, where the current tenancy includes rights enjoyed by the tenant in connection with the holding, those rights shall be included in a tenancy ordered to be granted.

It was this s. 32 (3) which gave the applicants their main argument, but they were also assisted by the provision in s. 35 about "other terms of the tenancy": these, in default of agreement, are to be determined by the court which shall have regard to the terms of the current tenancy and to all relevant circumstances. While Upjohn, J., drew attention to the fact that s. 32, unlike s. 35, gives the court no discretion, the learned judge did not base his decision on the provision in its subs. (3). It had been argued that the "rights enjoyed by the tenant in connection with the holding" were limited to such rights as touched and concerned the land demised; Upjohn, J., agreed that the right under discussion was not such a right, but declined to decide whether or not this circumstance excluded it from the scope of s. 32. It was not necessary for him to reach a conclusion on that point as the facts clearly fell within the purview of s. 35 and the case was one in which the term asked for ought to be included.

All relevant circumstances

An argument that the "terms of the current tenancy" were likewise limited to those which touched and concerned the demised premises was rejected ("I do not believe that, when s. 35 was framed, Parliament was contemplating that there should be an elaborate discussion of the terms contained in the tenancy as between those which touch and concern the demised premises and those which do not"); and the "great width" of the section was shown, the learned judge held, by the fact that the court must have regard not only to the terms of the current tenancy but to all relevant circumstances. The court had the widest possible discretion.

Judicial discretion

The respondents' main objection to the inclusion of the term was, to quote from their manager's affidavit, that any advertising sign was out of keeping with the use of the building for its purposes and was detrimental to the structure and appearance of the building. Dealing with this objection, Upjohn, J., mentioned that, at the invitation of both parties, he would take into account his own knowledge of the *locus in quo*, as he travelled along Piccadilly most mornings from the vantage point of the upper deck of a No. 9 omnibus and had, during the course of the hearing, made a careful inspection from Hamilton Place (which is not, as is sometimes supposed, the southern end of Park Lane); "and the idea that these signs are out of keeping seems to me, with all respect to the deponent, complete nonsense. There are signs almost by the hundred of that sort, and no detriment is suffered in that part of London if a building has a sign upon it."

In the witness box, the manager added that other tenants objected to paying the same rent as the one tenant who was entitled to have a big sign, and that tenants of the highest class (whom they wished to attract) objected to signs of any type. But, no examples having been cited, and evidence in fact having been given that a friendly foreign power were negotiating for a lease of the ground and first floors of the building and were not put off by the presence of the signs, and the applicants' witnesses not having been cross-examined about the objection, the learned judge concluded that the continued existence of the signs would have no adverse effect on the letting of the property, and made an order for a new lease to include the collateral term asked for.

Commercial considerations

It is, perhaps, always easy to criticise the way in which discretion has been exercised; and I hope that one or two observations which follow will not be considered criticism of the captious variety.

The *locus in quo*. While there must be some interdependence, it does seem that, while the respondents' manager addressed himself to the appearance of the building as a building, the learned judge (though traffic hold-ups are not infrequent at that spot) was concerned rather with its appearance in relation to the neighbourhood. Having visited the *locus* myself and made my own inspection (at a lower level, of course) it occurred to me that the judgment had ignored the "structure and" which preceded the word "appearance" in the respondents' manager's affidavit; and, while not laying any claim to a knowledge of architecture, I think I can safely say that whoever designed the building would be shocked to see advertisement signs affixed to it. Then, as regards the area covered by the new form of judicial notice, it struck me

that no signs, illuminated or unilluminated, were displayed outside Burlington House, inviting the public to buy more, or to buy contemporary, pictures and sculpture. The frontage of that building is not inconsiderable.

As regards the effect on letting value, the fact that a friendly foreign power (why "friendly"?) was not deterred was undoubtedly an important factor, and perhaps the respondents would have done better if they had complained of some small limitation in scope. For people in the same line of business as the applicants would surely be put off; if, say, a manufacturer of detergents were offered accommodation in offices to the outside of which were affixed advertisements proclaiming the virtues of other detergents, the prospects of his accepting a tenancy would be somewhat remote.

Aesthetic considerations

Reverting to the question of alleged detriment to structure and appearance and the learned judge's consideration of the surroundings, I see that the affidavit mentioned made some reference to the policy of the lessors and there is, perhaps, a faint suggestion that they were motivated partly by a desire to improve amenities. Whether such a desire could be treated as a "relevant circumstance" was not touched upon; but there might be something to be said for it. I have suggested that the architect who designed No. 1 Albemarle Street would be shocked if he saw it with the advertisement signs affixed; turning now to the matter of environment, to which Upjohn, J., appears to have limited the issue, I would further suggest that if Sir Christopher Wren could be permitted to occupy the vantage point of the upper deck of an east-bound No. 9 omnibus, and travel beyond the Royal Courts of Justice, he would suffer not only shock but bewilderment when the vehicle descended Fleet Street. For he would find that, after a seventeenth-century Parliament had ensured that St. Paul's Cathedral could be viewed, and viewed as it deserved, from the west, a nineteenth-century Parliament had authorised a railway company to mar that view by a bridge across the bottom of Ludgate Hill (the bridge not removed by a Commission in which a twentieth-century Parliament has since vested it). And if the control of advertisements provisions of Town and Country Planning legislation have not reduced the number of "signs almost by the hundred" displayed in Piccadilly, is that any reason why private policy designed to effect such reduction should be discouraged?

R. B.

WHY THEY GASPED

"WHENEVER," declared a solicitor recently, "anybody goes into the witness box and tells the truth, there are always gasps of astonishment from the back of the court." Whether this indicates an exceptionally low standard of veracity at this particular court or a high capacity for stupefaction amongst its frequenters would be difficult to say. Perjury of course from time to time has to be tolerated by the witness boxes of the most austere tribunals in the land, but it is unlikely that, taking the long view of things, one court suffers from it more than another. On the whole, the witness who goes into the box deliberately determined to give what he knows to be false evidence is rare. Most people against whom a claim or charge is made would rather admit it and be done with it than go to the bother of putting up a spurious defence with its attendant risks. This can be seen in the large proportion of criminal charges to which defendants plead guilty and of civil claims which never come into court at all. But whilst few are perjurers, there is a good sprinkling of trimmers. Nearly everyone is prone to add a little to his side of the scale and take a little out of the other. In painting the picture of what happened, we deepen the colours of our adversary and brighten those of our own. Then, too, what of the people at the back of the court? Perhaps not so hardened to testimony as the "publics" of other courts, it may be they were unduly sensitive and found it difficult to control their breathing. They were possibly not the ripe experienced loungers and Dolittles that fill the galleries of happier tribunals like a frieze of heads and shoulders of the damned from a woodcut illustrating Dante's Inferno. They come into the courts, so we are told, to see that Justice is properly administered. It is their presence that prevents judges and magistrates from behaving like Judge Jefferies on the Western Assize. They may not know this. They probably do not. Their own reasons for their presence would probably disappoint some of our more rhetorical writers on the administration of the law. These would include the fact that the pictures are not open in the morning and that unlike the court you have to pay to go in; that the wife can't abide them hanging round the house and says unkind things about early retirement; that, even though the lists are often dull, the court room is warm in winter and cool in summer; and that, anyway, it is an unholy joy to see their fellow citizens being grilled as many of the on-lookers have been themselves. There let us leave them—warm, unnagged and gasping and, too, fulfilling without fee or reward their great constitutional destiny, which, if they were aware of it, would probably astonish them as much as the witnesses.

F. T. G.

"THE SOLICITORS' JOURNAL," 5th MARCH, 1859

ON the 5th March, 1859, THE SOLICITORS' JOURNAL recorded a milestone in its progress: "Our subscribers will observe a change this week in the title at the head of our wrapper. The *Weekly Reporter*, as announced at the last annual meeting of the Law Newspaper Company, is now owned by the proprietors of THE SOLICITORS' JOURNAL, and the two publications are united under one management. A joint title would follow, under any circumstances, as a natural consequence; but in our case motives of convenience have also weighed. At present, when the cases in the *Reporter* are numerous and long, we have to pay double postage; while, by adopting one title for the *Journal* and the *Reporter*, the stamp will cover the postage of both. Our circulation has increased so much of late that the number of extra pennies has become formidable; and our readers will, no doubt, readily acquiesce in a change which will facilitate the distribution, while it will decrease the expense of the publication. The change of title, we may observe, applies to the *wrapper* only. The *Weekly Reporter* retains its own separate title at the head of its pages, and will bind up at the end of the year precisely as before. The same observation applies to THE SOLICITORS' JOURNAL."

HERE AND THERE

ROSES AT LAW

If one could have Wars of the Roses, I suppose one might have foreseen an Action of the Roses, but somehow it seemed impossible even though it was in the Temple Garden that the contending factions in those wars plucked their badges. However, if Adam, or rather Eve, could manage to invent sin in a God-created garden, there is no particular reason why causes of action should not sprout among the other weeds, the thorns and the thistles, which, true to the Scriptures, have plagued gardeners ever since. Still, if any garden plant had to get mixed up in a legal dispute, one would expect it to be the stubborn and tenacious ivy, and, indeed, a lady has obtained damages from a firm of contractors who, mistaking the address to which they had been sent, denuded her house of a much-prized mantling of the stuff. But roses that down the alleys shine afar belong rather to groups under the dreaming garden trees than to anxious huddles in the corridors of the Law Courts. They belong to the poetry of every age and every nation from Omar Khayyám to our own time, rather than to the parched and arid prose of statements of claim and defences. They figure but little in litigation and, off hand, I can only recall one appearance in the English courts—*Marlborough* v. *Gorringe's Travel & News Agency, Ltd.*, in 1935, when a duchess was justly outraged at a liberty taken in a transatlantic magazine, and, the chief offenders being safely out of reach of the arm of the English law, she sued the distributors. To a picture of a gardener contemplating two standard rose-trees intertwined there had been appended the caption: "I guess we shouldn't have planted the Duchess of Marlborough and the Rev. H. Robertson Page in the same bed."

THE RIOM CASE

Now the rose has just made another of its rare appearances in litigation, this time at Riom in Auvergne, which, of all French towns, has managed to acquire an almost legendary reputation for litigiousness, so that if anyone can manage to drag the queen of the flower garden into a law courts squabble, it would surely be the people of those parts. It all started with a prize offered by the town council of Vichy for the most beautiful roses at a local exhibition. Democratically the issue was to be decided by the votes of those who visited it. Now, on the second day one of the exhibitors, a M. François Croix, noticing that his roses were beginning to droop, called up reserves from ample stores of equally magnificent blooms and by this masterly strategy carried off the victory. But the exhibitor in second place, a rose specialist from Paris, brought an action against him. There must have been a point of construction on the rules or M. Croix would, presumably, never have defended the case as tenaciously as he did, for the dispute was carried through two hearings, at first instance and in the appeal court at Riom. The plaintiff obtained judgment for 200,000 francs which in the higher court was increased by another 50,000. In a country as much addicted to flower shows as England, where every village has its annual exhibition and even the Central Hall of the Law Courts blossoms in due season with the horticultural triumphs of the staff, this story is not without its relevance and the committees had better look to their rules lest a similar dispute arise over here.

BY ANALOGY

Taking the analogy of other sporting events, it hardly seems likely that there could be much argument in the courts, even by the most ingenious counsel, if a dispute arose over a contest in which a trainer had introduced a fresh horse and jockey half-way round the course, or a promoter had pushed a fresh boxer into the ring in the fifth round. M. Croix, should he suggest such an idea here, might well be in danger of being hailed by the rough islanders as "Mr. Double Cross." Even in the more esoteric world of the roses, staying power is as important as beauty. The evanescence of roses is a perpetual theme of mourning with the poets:

> "Mignonne, allons voir si la rose
> Qui ce matin avait desclose
> Sa robe de pourpre au soleil
> A point perdu cette vesprée
> Les plis a sa robe pourprée."

Or from Ronsard to Shakespeare:

> "Women are as roses whose fair flower,
> Being once displayed doth fall that very hour."

No lovely girl barrister or solicitor will win the title of Miss Legal Aid, 1959, at the forthcoming contest in Lincoln's Inn Fields if blooming in the morning, she droops and pales by noon, nor will her chambers or office be allowed to insinuate a fresher substitute in her place. Yes, the case of the roses in Riom was rightly decided.

Richard Roe.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of "The Solicitors' Journal"]

Losing Ground

Sir,—How can Mr. Bryan Cross blame accountants for forming limited companies when limited companies can be bought over the counter in a shop in the Strand? And why should off-the-peg companies be scorned by anybody with standard requirements when it not only costs much more to instruct a solicitor but means wasting probably ten days just to find out whether a proposed name is available for the new company, apart from the time for printing and then waiting for the certificate of incorporation?

Robert Egerton.

London, W.C.2.

Points in Practice

Trustee Borrowing Part of Trust Property on Mortgage

Sir,—We refer to the question under this heading in a recent issue [p. 153, *ante*] and your answer in which you say you cannot refer to any direct authority. May we invite your attention to Underhill's Law of Trust and Trustees, 9th ed., at p. 344, where it says quite definitely that trust money cannot be advanced to one of the trustees on mortgage however good the security may seem. Cases are cited in the footnotes on the same page.

Randle Thomas & Thomas.

Helston,
Cornwall.

REVIEWS

Business Mergers and Take-over Bids. By RONALD W. MOON, B.Litt. (Oxon), A.C.A. 1959. London: Gee & Co. (Publishers), Ltd. £1 5s. net.

Even to solicitors with barely a nodding acquaintance with company practice, this book has a distinct appeal. The author views the changing fashions in company operations from a considerable distance but with great clarity. The post-war phenomenon of the ruthless take-over bid is merely an interesting incident in a history of continual change.

This is not just an academic account of changing financial techniques, beginning with stately amalgamations in Victorian times and ending with Mr. Charles Clore. Actual case-histories are examined; for instance, the classic acquisition by Mr. Clore of what was to be the bridgehead for many subsequent sorties—J. Sears & Co.—is described in a way which the most unfinancially-minded reader will find enlightening.

Solicitors with worried directors on their hands may also read profitably Mr. Moon's suggestions for discouraging the take-over bid. The book is intended for the accountancy profession as well as the general reader; the lawyer may therefore regret the omission of detailed comment on the labyrinthine regulations tending to drive the potential bidder away from his solicitor's office into the more plushy surroundings of the licensed dealer in securities. On the other hand, the author's commentary on the workings of the Capital Issues Committee is (thank goodness) out of date. Some future edition might usefully deal, instead, with the effects of the Prevention of Fraud (Investments) Act.

This book is a "must" for those who may be called upon to advise upon changes in company structure or ownership and for those who (like the reviewer) appreciate an ability to expound on what might otherwise be a dry and academic topic in a fresh and illuminating way.

Gibson's Conveyancing. Eighteenth Edition. By R. H. KERSLEY, M.A., LL.M. (Cantab.), Solicitor. 1959. London: The Law Notes Lending Library, Ltd. £4 net.

Practitioners and students alike will extend a hearty welcome to the eighteenth edition of this well known work. Every reference made to *Gibson* evokes admiration for the concise yet comprehensive manner in which it presents its subject-matter. The new edition is no exception. In the time which has elapsed since 1952, when the last edition was published, such relevant statutes as the Landlord and Tenant Act, 1954, the Landlord and Tenant (Temporary Provisions) Act, 1958, the Costs of Leases Act, 1958, the Town and Country Planning Acts, 1953 and 1954, the Variation of Trusts Act, 1958, and the Agriculture Act, 1958, have been enacted, and the author has amended or added to the text as appropriate in the light of the new legislation. Appropriate references also are made to certain sections of recent Finance Acts, such as s. 38 of the 1957 Act and ss. 20 to 22 and 28, 29, 34 and 35 of the 1958 Act, and as many as 450 new cases have been incorporated.

Although the new edition with index covers 845 pages, the author assures us that the increased size is due to the use of a larger type face and not to any overall expansion in quantity of text. In the circumstances, the moderation shown in increasing the price by only half a crown is commendable.

It is desirable that a reviewer should produce some constructive suggestions where possible and the following points are intended as such. In connection with the requirement in a compulsory registration area for application for registration to be made within two months of the conveyance, grant or assignment in question, it could be explained on p. 677 that in practice the registrar automatically exercises his discretion under s. 123 of the Land Registration Act, 1925, unless there be an inherent defect in the title not capable of rectification; from this it follows that appeals to the court from a decision of the registrar are unknown. Although reference is made to a *commorientes* clause in a will and its effect on estate duty, at p. 605, it is not explained that such a clause is still desirable to cover the case of, e.g., a testator and principal beneficiary under his will dying in a known order within a short time of each other where the beneficiary dies later; s. 30 of the Finance Act, 1958, only reduces by 75 per cent. the estate duty payable in such a case. Although mention is made on p. 584 (note (*l*)) of the ability of an infant over fifteen to make a nomination in respect of national savings certificates or Post Office Savings Bank deposits, no reference is made to what is potentially by far the most important type of nomination, that in respect of securities held on the Post Office Register (*cf.* 102 SOL. J. 116). If more space is required by the author for his next edition he could consider reducing that allocated to extracts from the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950; to bills of sale to which no less than twenty-nine pages are devoted; and to the matters contained in Appendices A and B, namely, enfranchisement of copyholds and transitional provisions of the property statutes of 1925, which cover twenty-six pages.

The Legal Historian. Number I. 1958. Published annually for the American Society for Legal History by The Bobbs-Merrill Co., Inc., Indiana.

This first number of a new American publication represents the first step in the public relations of a freshly conceived enterprise in the United States designed somewhat on the lines of our Selden Society only with "much broader" aims in that it will "seek to promote the study in the United States of the history of all laws, including English Law, Roman Law, Canon Law as well as American Law." A main object will be the preservation and publication of American legal records. This first number, apart from the statement of the Society's programme, is chiefly concerned with the enumeration of the members (something over a hundred) classified alphabetically, with biographical matter, and also by profession, together with a bibliography of those who are authors. We look forward with interest to the fruits of this idea.

SOCIETIES

In THE LAW SOCIETY'S Preliminary Examination held on 2nd February, thirty-eight candidates entered and seventeen passed.

The President of THE LAW SOCIETY, Mr. Leslie E. Peppiatt, M.C., is on his way to attend the Centenary Celebrations of the Law Institute of Victoria, the oldest legal association in Australia and certainly amongst the oldest in the British Commonwealth, which are being held from 16th to 23rd March, 1959.

UNIVERSITY OF LONDON, KING'S COLLEGE FACULTY OF LAWS SOCIETY announces its annual lecture this year, "The Traditions and Future of the Bar of England," to be given by Sir Frederick Pritchard, M.B.E., LL.D., in the College, on Friday, 6th March, 1959, at 5 p.m.

The SOLICITORS' ARTICLED CLERKS' SOCIETY announce the following programme: May: Tuesday, 5th: Debate at The Law Society. Subject will be announced later. Thursday, 7th: Free Dance at the Gay Compton Club, 44 Old Compton St., W.1. Dancing and bar until 2.00 a.m. Members admitted free: Guests 3s. 6d. Tuesday, 26th: Theatre Party. Applicants for "Irma La Douce" tickets are requested to send 5s. to Tony Hurst by 9th March, with stamped and addressed envelope. June: Tuesday, 2nd: Mock Trial at The Law Society at which the case of "*Dogsbody-Crumb* v. *Dogsbody-Crumb*" will be tried before Judge and Jury. Tuesday, 9th: Swimming Party. Please ring Tony Hurst at PRI 8277 (evenings) nearer the date for final details. July: Tuesday, 7th: A Social Evening at The Law Society. Tuesday, 21st: New Members Evening at The Law Society. Saturday, 25th: House Party at 17 Wren View, N.W.2.

POINTS IN PRACTICE

Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the "Points in Practice" Department, The Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, London, E.C.4. They should be brief, typewritten in duplicate, and accompanied by the name and address of the sender on a separate sheet, together with a stamped addressed envelope. Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.

Will—Contradictory Provisions

Q. We act for the executors and trustees of the will of a testator who died in 1949. After giving three small pecuniary legacies he gave, devised and bequeathed all the rest residue and remainder of his estate to his trustees upon trust for sale with power to postpone. The will directed the trustees to invest and to pay the income to the testator's sister for her lifetime and after her death to pay a large number of legacies to individuals and charities and then gave any residue to be divided between two charities. Immediately before the gift of residue to the two charities, however, the will provided that after the death of the testator's sister a certain freehold house was devised to a cousin. It would seem to us that the trust for sale amounted to a notional conversion of the whole estate at his death into money. The sister has recently died; the freehold house has not been sold. The question is as to whether the gift of the freehold house is effective. It seems to us that at the time the gift of the house became operative it had already notionally been converted into money. A possible complication is that it is uncertain whether the estate will be adequate to pay the legacies in full. This will depend upon the prices obtained for certain other properties. If there should not be sufficient to pay the legacies in full, would that make any difference as to whether or not the house passed to the cousin? Should it perhaps be sold and the cousin receive the same proportion of the net proceeds of sale as the other beneficiaries' receipt of their legacies?

A. This is a case where one must apply the general rule of will construction, that where there are two contradictory provisions in a will the later one is to prevail. See Halsbury, 2nd ed., vol. 34, p. 218. In *Re Hammond* [1938] 3 All E.R. 308, Simmonds, J., at p. 308, said this: "It [the maxim *cum duo inter se pugnantia reperiuntur in testamento ultimum ratem est*—an intention is attributed to a testator that, where in a will there are two inconsistent provisions, the later is to prevail] is an arbitrary rule in the sense that one can only give effect to the intention of the testator, but it is better to follow a general rule than to rely on the fine distinctions which can be of no substance." In this case there were legacies to *A* of five hundred pounds (£500), to *B* of one hundred pounds (£500) and to *C* of five hundred pounds (£500). It was held that B was entitled to £500. Thus the cousin can be treated as having a devise of the house after the termination of the life interest. It would not be affected by any deficiency in funds for payment of legacies.

Conveyance by Club on Appointment of New Trustees

Q. A club, unincorporated, purchased and conveyed a piece of land to two of its members as joint tenants, with a declaration that the purchasers were the duly appointed trustees of the club, and the land vested in them as trustees, according to the rules of the club. Both trustees are now deceased, and it is proposed that the committee will nominate two other members to be appointed as trustees in place of the deceased trustees, and on the same terms. We shall be glad if you will refer us to an appropriate precedent.

A. A purchaser is in no way concerned with the club or its rules. These matters are behind the conveyancing curtain even though mentioned in the conveyance on trust for sale. The appointment of new trustees should be effected in the normal way. Since the conveyance mentioned the club, there is no reason why things should not "be kept tidy" by including in the deed of appointment a recital that the new trustees have been nominated by the club. But the appointment is made by the personal representatives of the last surviving trustee under the statutory power contained in the Trustee Act, 1925, s. 36 (1) (*b*). The recital could be in some such words as these: "Whereas [the said club] [the club referred to in the said conveyance] has in accordance with its rules nominated the new trustees to be the new trustees of the conveyance and has requested the appointors to appoint them the new trustees thereof in the manner hereinafter appearing which the appointors have agreed to do."

Appropriation in respect of Residuary Interest under Intestacy

Q. *A* dies intestate in 1958, leaving three children, all of age and *sui juris*, the only persons entitled to his estate. The net estate available for distribution is £12,000. By consent of all concerned, instead of receiving his one-third share of the £12,000 in cash, one child, *X*, is to take a house belonging to the intestate and worth £4,000. There is no formal deed of family arrangement, etc., and the administrator (which is, incidentally, a trust corporation which took the grant by consent of the beneficiaries) is about to assent in favour of *X* in respect of the house. Four questions arise: (1) Is it advisable to put any recitals in the assent, or should it be in the usual short form? (2) Would a subsequent purchaser from *X* be entitled to go behind the assent to make sure that it was in favour of the correct person? There would be no evidence on the grant of administration or (if in the short form without recitals) on the face of the assent that the assent is *not* in favour of the correct person (for all a purchaser knows *X* might have been the only beneficiary), but on the other hand, if *X's* purchaser knows that *X* had brothers or sisters he might ask how it was that the assent was to *X* alone when three persons were *prima facie* entitled. (3) Is the assent liable to *ad valorem* stamp duty on £4,000 as an appropriation? With regard to s. 41 of the Administration of Estates Act, 1925, *Jopling* v. *Inland Revenue Commissioners* [1940] 2 K.B. 282, of course, dealt with a pecuniary legacy, not residue, but it seems to me that the assent *would* be liable to duty, for this reason: primarily, *X* is entitled only to a share in the *net proceeds of sale* of *A's* residuary estate, as the administrator of an intestate holds on trust for sale. The appropriation with *X's* consent under s. 41 seems to me to contain a sufficient element of bargain as in *Jopling's* case, to render the assent liable to *ad valorem* duty. There seems to me to be no essential difference between a pecuniary legacy and a share in proceeds of sale of residue—in each case the beneficiary, under an appropriation, is receiving something to which he is not primarily entitled. (4) Apart from stamp duty considerations, would it not save a deal of trouble if the administrator made a straightforward conveyance on sale to *X*, the consideration being stated as £4,000? No one could then possibly go behind the conveyance.

A. Conveyancers do not, in general, take the view that the principle of *Jopling* v. *Inland Revenue Commissioners* [1940] 2 K.B. 282 applies to appropriations made in respect of residuary gifts or interests arising under an intestacy. The reason is this. When an appropriation is made in respect of a pecuniary legacy, it is rightly regarded as a sale by the personal representatives to the legatee. He has no right to receive the appropriated property; nor has he any interest whatsoever in it. There is simply a transfer of his legacy, with the concurrence of the personal representative, in return for the property; this is a sale in the ordinary sense of the word and, as such, attracts *ad valorem* stamp duty. On the other hand, in the case of a share of residue, or a share of an intestate's property, the person entitled has, with other persons, a definite interest in the property appropriated to meet his share. With the others similarly entitled, he can be regarded as a beneficial tenant in common or person entitled to receive part of the net proceeds of sale, and part of the net rents and profits pending sale. See, e.g., Encyclopædia of Forms and Precedents, 3rd ed., vol. 6, pp. 554, 621 and 662. So there is really a partition by arrangement with the personal representatives. In the example given, *X* is receiving property exactly equal to his share; consequently, it is inappropriate to treat this as a sale. To deal with the specific questions: (1) No special recitals should be included in the assent. (2) There seems to be no reason why future purchasers should not be content to rely on the Administration of Estates Act, 1925, s. 36 (7), in the ordinary way. (3) For the reason already mentioned, no. (4) There seems to be no reason, having regard to the previous two answers, why any advantage would be gained by having a conveyance in favour of *X*.

IN WESTMINSTER AND WHITEHALL

HOUSE OF LORDS

Progress of Bills

Read First Time :—

Eisteddfod Bill [H.C.] [24th February.

International Bank and Monetary Fund Bill [H.C.] [24th February.

Mid-Wessex Water Bill [H.C.] [26th February.

Read Second Time :—

Family Allowances and National Insurance Bill [H.C.] [24th February.

Read Third Time :—

Domicile Bill [H.L.] [24th February.

HOUSE OF COMMONS

A. Progress of Bills

Read First Time :—

Protection of Tenants (Local Authorities) Bill [H.C.] [25th February.

To provide security of tenure for tenants of local authorities, authorities owning or managing new towns, housing associations, housing trusts, and other similar bodies.

Television (Commercial Advertisements) (No. 2) Bill [H.C.] [24th February.

To amend the Television Act, 1954, by prohibiting the interruption of programmes by commercial advertisements and to regulate the intervals between advertisements.

Read Second Time:—

Port of London Bill [H.C.] [26th February.

Rating and Valuation Bill [H.C.] [23rd February.

B. Questions

Private Street Works

Mr. Bevins said that it had been decided to put in hand a broader survey of the working of the arrangements for the making up of private streets. When the survey was completed an amendment of the law would be considered. [24th February.

Shipowners (Limitation of Liability)

Mr. R. Allan said that the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, which was signed at Brussels in October, 1957, was ratified by Her Majesty's Government in the United Kingdom on 18th February, 1959. Up to the present no other State had ratified the Convention. [25th February.

Prisoners (Interviews)

Mr. Butler said that interviews between prisoners and their legal advisers about legal proceedings, civil or criminal, to which the prisoner was a party, were not conducted in the hearing of an officer. At other interviews the supervising officer was not concerned solely with the maintenance of prison security, and on occasion it might be his duty to report information about other matters to his superiors, but to no one else. [26th February.

Tribunals of Inquiry (Evidence) Act, 1921

Mr. Butler said that the Government were prepared to give careful consideration to the question of amending the Tribunals of Inquiry (Evidence) Act, 1921, in the light of the experience gained of its operation, though they did not think that the present moment was suitable for a Select Committee inquiry into the adequacy of the Act. [26th February.

STATUTORY INSTRUMENTS

Birmingham Municipal Bank (Amendment) Order, 1959. (S.I. 1959 No. 300.) 4d.

Cardiff-Brecon-Builth Wells-Llangurig Trunk Road (Cefn-coed-y-cymmer Link Road) Order, 1959. (S.I. 1959 No. 280.) 5d.

Death Duties (Northern Ireland) (Relief against Double Duty) (Ghana) Order, 1959. (S.I. 1959 No. 295.) 4d.

Death Duties (Relief against Double Duty) (Ghana) Order, 1959. (S.I. 1959 No. 294.) 4d.

Foreign Marriages (Egypt, Iran and Iraq) (Amendment) Order, 1959. (S.I. 1959 No. 297.) 4d.

Foreign Marriages (Transjordan) (Revocation) Order, 1959. (S.I. 1959 No. 298.) 4d.

Gwynedd River Board (Malltraeth Marsh Internal Drainage District) Order, 1959. (S.I. 1959 No. 271.) 5d.

Importation of Hay and Straw (Amendment) Order, 1959. (S.I. 1959 No. 287.) 4d.

Importation of Raw Vegetables (Scotland) Order, 1959. (S.I. 1959 No. 304 (S. 9).) 5d.

Import Duties (Temporary Exemptions) (No. 1) Order, 1959. (S.I. 1959 No. 270.) 5d.

Import Duty Drawbacks (No. 1) Order, 1959. (S.I. 1959 No. 290.) 5d.

Import Duty Drawbacks (No. 2) Order, 1959. (S.I. 1959 No. 291.) 5d.

London Traffic (Prescribed Routes) (Westminster) Regulations, 1959. (S.I. 1959 No. 283.) 5d.

London Traffic (Prohibition of Driving) (Back Road, Hackney) Regulations, 1959. (S.I. 1959 No. 282.) 4d.

Meters (Periods of Certification) Order, 1959. (S.I. 1959 No. 272.) 5d.

Milk and Dairies (General) Regulations, 1959. (S.I. 1959 No. 277.) 11d.

Neath-Abergavenny and East of Abercynon-East of Dowlais Trunk Roads (Hirwaun and other diversions) (Variation) Order, 1959. (S.I. 1959 No. 281.) 4d.

Northern Rhodesia (Gurembe District) Order in Council, 1959. (S.I. 1959 No. 296.) 6d.

Patents Appeal Tribunal Rules, 1959. (S.I. 1959 No. 278.) 4d.

Retention of Cables, Mains, Sewers and Drains under Highways (County of Lancaster) (No. 1) Order, 1959. (S.I. 1959 No. 250.) 5d.

Draft **Small Farmer** (England and Wales and Northern Ireland) Scheme, 1959. 7d.

Draft Small Farmer (England and Wales and Northern Ireland) Supplementary Scheme, 1959. 7d.

Draft **Small Farmers** (Scotland) Scheme, 1959. 7d.

Stopping up of Highways (City and County Borough of Birmingham) (No. 4) Order, 1959. (S.I. 1959 No. 265.) 5d.

Stopping up of Highways (City and County of Bristol) (No. 3) Order, 1959. (S.I. 1959 No. 245.) 5d.

Stopping up of Highways (County of Essex) (No. 2) Order, 1959. (S.I. 1959 No. 246.) 5d.

Stopping up of Highways (County of Flint) (No. 1) Order, 1959. (S.I. 1959 No. 264.) 5d.

Stopping up of Highways (County of Hertford) (No. 2) Order, 1959. (S.I. 1959 No. 275.) 5d.

Stopping up of Highways (County of Lancaster) (No. 3) Order, 1959. (S.I. 1959 No. 252.) 5d.

Stopping up of Highways (County of Northampton) (No. 1) Order, 1959. (S.I. 1959 No. 273.) 5d.

Stopping up of Highways (County of Northumberland) (No. 1) Order, 1959. (S.I. 1959 No. 253.) 5d.

Stopping up of Highways (Counties of Nottingham and Leicester) (No. 2) Order, 1959. (S.I. 1959 No. 268.) 5d.

Stopping up of Highways (County of Stafford) (No. 2) Order, 1959. (S.I. 1959 No. 274.) 5d.

Stopping up of Highways (County of Sussex, West) (No. 2) Order, 1959. (S.I. 1959 No. 254.) 5d.

Stopping up of Highways (County of Sussex, West) (No. 3) Order, 1959. (S.I. 1959 No. 284.) 5d.

Stopping up of Highways (County of Sussex, West) (No. 4) Order, 1959. (S.I. 1959 No. 279.) 5d.

Stopping up of Highways (County of Wilts) (No. 1) Order, 1959. (S.I. 1959 No. 266.) 5d.

Stopping up of Highways (County of Wilts) (No. 2) Order, 1959. (S.I. 1959 No. 267.) 5d.

Stopping up of Highways (County of York, West Riding) (No. 3) Order, 1959. (S.I. 1959 No. 269.) 5d.

Wolverhampton Water Order, 1958. (S.I. 1959 No. 286.) 7d.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

Court of Appeal

RATING: HOUSING TRUST: WHETHER CONDUCTED FOR PROFIT

Guinness Trust (London Fund) Founded 1890 Registered 1902 *v.* West Ham Borough Council

Jenkins, Sellers and Pearce, L.JJ. 4th February, 1959

Appeal from the Divisional Court ([1958] 1 W.L.R. 541; 102 SOL. J. 364).

The operative part of a trust deed constituting a housing trust provided: "1. (A) The objects to which the fund shall be applicable are declared to be: The amelioration of the condition of the poorer classes of the working population of London and of their modes and manners of living, by the provision of improved dwellings; by giving them facilities, should the trustees think it desirable . . . for obtaining means of subsistence and the necessaries and decencies of life; and by such other means as the trustees may in their uncontrolled discretion think fit. (B) Without restricting the interpretation in the widest sense of the objects as before defined, it is the intention of the founder that the original capital of the fund should, by expenditure on objects of a permanent character returning a fair low rate of interest, as far as possible, be kept intact and go on increasing, so that, whilst payments of money in the nature of gifts . . . are not precluded, the purpose to be kept in view may be assistance to individuals to improve their condition, without placing them in the position of being the recipients of a bounty." There followed further provisions giving the trustees a very wide discretion in the administration of the trust. The trust claimed the benefit of s. 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of a working persons' hostel. This claim was upheld by quarter sessions, but rejected on appeal by the Divisional Court. On an appeal by the trustees, it was conceded that their main objects were charitable, and the sole question at issue was whether they were "an organisation . . . not established or conducted for profit."

JENKINS, L.J., said that the case of *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* in the Court of Appeal ([1957] 2 Q.B. 573) and the House of Lords ([1958] 3 W.L.R. 172) must be considered. In that case a mutual benefit society accumulated large reserves in the form of land and investments. Parker, L.J., said that such an accumulation was necessary and inevitable; but the earning of such profits was purely incidental and it could not be said that the organisation was established or conducted for profit. In the House of Lords this view was upheld; Lord Keith said that the rents and interest were no doubt profits for income tax purposes, but that did not mean that the society was "established or conducted for profit" within s. 8. Lord Denning said that "conducted for profit" meant "conducted for the purpose of making profit." In the present case the Divisional Court, which had the opportunity of considering the report of the *National Deposit* case in the Court of Appeal only, came to the conclusion that the trust, if not established for profit, was conducted for profit in that it accumulated funds to expand the scope of its operations. It was impossible to accept that view; it was plain that the objects of the trust were set out in 1 (A), and that 1 (B), which directed the retentions of income, was merely an ancillary provision inserted to assist in the carrying out of the charitable purpose set out in 1 (A). Because the trust did make what could be called a profit, it did not follow that it was established or conducted for that purpose. The true view was that it was not established or conducted for the purposes of profit. The trust was entitled to the benefit of the section, and the appeal should be allowed.

SELLERS and PEARCE, L.JJ., agreed. Appeal allowed. Leave to appeal.

APPEARANCES: *John Pennycuick*, Q.C., and *J. P. Widgery*, Q.C. (*Travers Smith, Braithwaite & Co.*); *Harold Williams*, Q.C., and *Geoffrey Rippon* (*G. E. Smith*, Town Clerk, West Ham).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 233**

LANDLORD AND TENANT ACT, 1954: LANDLORD'S INTENTION TO OCCUPY FOR OWN BUSINESS

Espresso Coffee Machine Co., Ltd. *v.* Guardian Assurance Co., Ltd.

Lord Evershed, M.R., Romer and Ormerod, L.JJ.
6th February, 1959

Appeal from Harman, J. ([1958] 1 W.L.R. 900; 102 SOL. J. 601).

An application under the Landlord and Tenant Act, 1954, by the Espresso Coffee Machine Co., Ltd., for the grant of a new lease of their business premises in the ground floor and basement of 227–228 Strand, London, W.C.2, was opposed by their landlords, Guardian Assurance Co., Ltd., on the ground that on the termination of the current tenancy on 25th March, 1958, they intended to occupy the premises for the purposes of a business to be carried on by them within the meaning of s. 30 (1) (*g*) of the Act. The landlords were occupying premises nearby which had become too small for their needs and the lease under which they held expired in June, 1960. They had bought the freehold of the premises occupied by the Espresso Coffee Machine Co., Ltd., in 1951 with a view to occupying them, but about January, 1958, when the originating summons was issued, they became interested in other nearby premises known as 199 Strand which were being reconstructed. Negotiations were begun between the landlords and the owners of 199 Strand, but at the date of the hearing of the tenants' application they were incomplete and no draft lease or contract had been put before the landlords. The tenants contended that at the material time for the purposes of s. 30 (1) (*g*), that is the date of the hearing of their application, the landlords had not established that if they got possession of the premises, they had a fixed and definite intention to occupy them within the meaning of para. (*g*). The board of the landlord company had, in March, 1958, passed a resolution stating that they intended to occupy the premises; and at the hearing of the application and of the appeal their counsel gave an undertaking that, on obtaining possession of the premises, they would occupy them. The judge refused to grant a new tenancy and the tenants appealed.

LORD EVERSHED, M.R., said the Act put a landlord in the difficulty that he had definitely to make up his mind to which of two possible alternatives he would pin his hopes. He, his lordship, did not accept the submission that continuing negotiations for the new premises would be inconsistent with an intention to occupy 227–228 Strand. The judge had found that the landlords had established at the date of the hearing a sufficiently fixed intention, and having regard to the evidence and to the undertaking given by counsel his finding was justified.

ROMER, L.J., agreeing, said that such an undertaking by a responsible body, such as the landlords in the present case, and accepted by the court, was decisive of the fixity of intention. He referred to *Betty's Cafés, Ltd. (No. 2)* v. *Phillips Furnishing Stores, Ltd.* [1957] 1 W.L.R. 799 in which, at p. 802, Danckwerts, J., had expressed a similar opinion. Appeal dismissed.

APPEARANCES: *J. P. Widgery*, Q.C., and *Lionel A. Blundell* (*Charles Caplin & Co.*); *R. E. Megarry*, Q.C., and *Christopher French* (*Trower, Still & Keeling*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] **[1 W.L.R. 250**

RATING: *RES JUDICATA*: DECISION OF LOCAL VALUATION COURT: SCIENTIFIC SOCIETY

Society of Medical Officers of Health *v.* Hope (V.O.)

Morris and Sellers, L.JJ., and Wynn Parry, J.
9th February, 1959

Appeal from Lands Tribunal.

Section 48 (4) of the Local Government Act, 1948, provides that on appeal to a local valuation court the court "shall give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as appear to them to be necessary . . ." In 1951 a society made a proposal to delete from the current valuation list a hereditament occupied

by it on the ground that it was exempt from payment of rates under s. 1 of the Scientific Societies Act, 1843. The valuation officer objected. On appeal to the local valuation court for the area, the court decided that the hereditament was exempt under the Act of 1843, and directed that the list be amended to accord with that decision. On 1st April, 1956, a new valuation list came into force by virtue of statutory directions, and the society's hereditament was entered on that list with gross and rateable values. The society again made a proposal that it be exempt under the Act of 1843. The valuation officer objected. On appeal to the local valuation court for the same area, the court stated that they had in 1951 decided that the society was exempt, and in the absence of evidence adduced by the valuation officer of any variation in the society's constitution and activities since 1951, the court decided that the hereditament be exempt from rates under the Act of 1843. On the valuation officer's appeal to the Lands Tribunal, the society entered a plea of *res judicata*, and the tribunal heard the appeal on that preliminary point, but rejected the plea of *res judicata*. The society appealed.

MORRIS, L.J., said that he could not accept the society's submission that the court in 1951 had decided that the society had a status which gave it exemption from rates and that that decision was binding for the future unless the facts altered. The valuation court in 1951 did not and could not decide any question other than that before it, which was whether an entry should be made in the then valuation list in the manner set out in the society's proposal. That court never purported to give a decision which could operate in relation to the year 1956. It had been argued that the 1951 decision must have involved the conclusion, as a matter of law, that the society was "instituted for purposes of science, literature or the fine arts exclusively." The court in 1951 ought to have decided that in order to reach the decision they did; but that did not give rise even to a limited estoppel, for the court in 1951 had no jurisdiction save to deal with the then existing valuation list. Their decision on any incidental issue of fact or law, even though necessary to decide as to the valuation list before them, could not be conclusive in reference to any future entries to be made on any future valuation list. A new list came into existence because there was a statutory obligation to make it. The force and effect of any decision relating to the 1951 list became spent and exhausted when that list was replaced by the new valuation list. The plea of *res judicata* failed and the appeal should be dismissed. But his lordship could not accept the submission for the valuation officer that a proceeding before a local valuation court was not a *lis inter partes*, but only administrative machinery for deciding what entries should be made in a valuation list. The provisions of s. 48 of the Local Government Act, 1948, showed that a local valuation court was not an assessing authority.

SELLERS, L.J., dissenting, said that unless authority restrained him he would reject the view that there could be no finality on any issue in rating. The present issue seemed to him not to be affected by any question of value or estimate. The society had found itself placed on the new list coming into force on 1st April, 1956. Its only claim for exemption was that it was a scientific society within the Act of 1843. The only issue, the only "*res*," which arose was whether or not the society was so exempt. In an issue already tried between the same parties, in the court provided to hear such a dispute, it had been held that the society was within the Act. The matter was, therefore, *res judicata* on the agreed basis that the circumstances had not changed; and the question could not be litigated further, even if the decision, if reviewed, might be held to be wrong. If on the same facts the valuation court were to find contrary to its 1951 decision, there would be two conflicting decisions of the same court in litigation between the same parties on the same subject-matter, the only difference being an interval of five years. He would allow the appeal.

WYNN PARRY, J., concurring in dismissing the appeal, said that a decision of any court on a particular list could only bind the parties at most during the currency of that list. The doctrine of *res judicata* was inapplicable in this case. He concurred with the other members of the court in holding that the local valuation court was a court of competent jurisdiction to decide the issue between these parties and that the dispute between them was a *lis inter partes*. Appeal dismissed.

APPEARANCES: *D. Tolstoy* (*Hillearys*); *H. J. Phillimore*, Q.C., and *Patrick Browne* (*Solicitor of Inland Revenue*).

[Reported by Miss M. M. HILL, Barrister-at-Law] **[2 W.L.R. 377**

STAMP DUTY: SECURITY: AGREEMENT TO PROVIDE BROADCASTING PROGRAMMES: FLUCTUATING PAYMENTS

Independent Television Authority, Ltd., and Associated-Rediffusion, Ltd. *v.* Inland Revenue Commissioners

Jenkins, Romer and Pearce, L.JJ. 9th February, 1959

Appeal from Wynn Parry, J. ([1958] 1 W.L.R. 943; 102 SOL. J. 635).

By an agreement under seal dated 23rd May, 1955, made between Independent Television Authority ("I.T.A.") and Associated-Rediffusion, Ltd. ("A.R."), A.R. agreed to provide programmes for broadcasting by I.T.A. pursuant to s. 2 of the Television Act, 1954. The agreement was to come into operation between 15th August, 1955, and 15th November, 1955, and to continue in force until 29th July, 1964. A.R. was to pay I.T.A. a fee at the rate of £495,600 a year for two and a half years and at a rate of £536,900 thereafter. The agreement further provided for an increase or decrease of such payments in the event of an increase or decrease of 5 per cent. or more in the half-yearly index figure (therein defined), compared with the basic index figure (defined as meaning the average of the index figures for all items in the Interim Index of Retail Prices published by the Board of Trade). The Inland Revenue Commissioners held that the agreement was liable to *ad valorem* stamp duty under the head of charge "Bond, Covenant, or Instrument of any kind whatsoever (1) being the only or principal or primary security for . . . any sum or sums of money at stated periods" within the meaning of Sched. I to the Stamp Act, 1891, and so assessed the duty on the sums payable annually at £495,600 and £536,900 respectively. Wynn Parry, J., affirmed their decision. The authority and the contractor appealed. *Cur. adv. vult.*

JENKINS, L.J., said that counsel for the appellants raised two objections to the assessment in question. First, it was contended that the agreement was wholly outside the "Bond, Covenant, or Instrument" head of charge because it was not an agreement securing the payment of periodical sums recoverable by the obligee as a debt merely upon proof of the agreement and of the fact of non-payment, but was an agreement for the payment of periodical sums by way of remuneration for services to be rendered. Their lordships agreed with the judge that on the authorities this argument was concluded against the appellants so far, at all events, as the Court of Appeal was concerned. See *Jones* v. *Inland Revenue Commissioners* [1895] 1 Q.B. 484; *National Telephone Co., Ltd.* v. *Inland Revenue Commissioners* [1899] 1 Q.B. 250; [1900] A.C. 1, and other cases. The second point taken by the appellants was to the effect that even if the agreement was not excluded from this head of charge on the grounds advanced in support of their first objection, the sums periodically payable were incapable of ascertainment at the date of the agreement save as regards the payment to be made in respect of the first half-yearly period ending on 31st March, 1956, owing to the provisions in the third schedule to the agreement for half-yearly increases or decreases in the sum payable by reference to any increase or decrease of 5 per cent. or more in the half-yearly index figure. Accordingly, while they accepted, notwithstanding the powers therein contained of avoiding or determining the agreement in certain events, the commissioners' view that the payments were to be made "for a definite and certain period" (viz., the period beginning on 15th November, 1955 (the latest date for the commencement of broadcasting), and ending on 29th July, 1964 (being the date fixed for the expiration of the agreement)), the appellants submitted that it could not be predicated of them that they were to be made not merely for a definite and certain period but, as the head of charge required, "for a definite and certain period, so that the total amount to be ultimately payable can" (that was to say, at the date of the agreement) "be ascertained." The court agreed with the judge that this argument could not be maintained consistently with the case of *Underground Electric Railways Company of London, Ltd.* v. *Inland Revenue Commissioners* [1906] A.C. 21 ("the first *Underground* case"), read in conjunction with the case of *Underground Electric Railways Co. of London, Ltd. and Glyn, Mills, Currie & Co.* v. *Inland Revenue Commissioners* [1916] 1 K.B. 306 ("the second *Underground* case"). Appeal dismissed. Leave to appeal.

APPEARANCES: *Geoffrey Cross*, Q.C., and *J. G. Monroe* (*Allen and Overy*); *John Pennycuick*, Q.C., and *E. Blanshard Stamp* (*Solicitor of Inland Revenue*).

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law] **[1 W.L.R. 259**

Queen's Bench Division

PRACTICE: TRIAL: ESTIMATED LENGTH: DUTY TO INFORM CLERK OF THE LISTS OF DEVELOPMENTS

Practice Direction

Lord Parker, C.J. 12th February, 1959

LORD PARKER, C.J., said that the Fixed List was for the convenience of parties, solicitors and counsel. It was quite impossible to work it unless the Clerk of the Lists was given full and accurate information from day to day as to the course of a case—whether there were negotiations for settlement, whether an issue had been withdrawn, whether medical reports had been agreed, and what was the probable length of the case. That was why R.S.C., Ord. 36, r. 9 (2), provided: "It shall be the duty of all parties to an action entered in any list to furnish without delay to the officer who keeps the list, all available information as to the action being or being likely to be settled, or affecting the estimated length of the trial, and, if the action is settled or withdrawn, to notify that officer of the fact without delay and take such steps as may be necessary to withdraw the record." That was never done now and he was concerned about it. It could be done. Anybody who had been on circuit knew that with co-operation between whoever was making up the day's list, counsel, counsel's clerks and solicitors, a very accurate estimate of the length of a trial could be made. No attempt was made to do that in London. The only course, if the lists were going to work, was that it should be the joint responsibility of counsel and their clerks and solicitors to tell the Clerk of the Lists, as from the moment the case came into the Warned List on Thursday of each week, exactly what the latest estimate of the length of trial was. If there was any alteration in the position between the date when the case came into the Warned List and the fixing of the Daily Cause List, that duty continued up to the last moment. Only in that way could the lists be worked. It was for counsel to see that their clerks knew the position.

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law] **[1 W.L.R. 258**

Court of Criminal Appeal

GAMING: WINNING MONEY BY FRAUD IN WAGERING

R. *v.* Clucas; R. *v.* O'Rourke

Lord Parker, C.J., Donovan and Ashworth, JJ.
2nd February, 1959

Appeals against conviction.

The appellants were convicted, *inter alia*, of several offences of obtaining money by fraud in wagering, contrary to s. 17 of the Gaming Act, 1845. Giving false names, and pretending to act on behalf of a number of persons, they had placed substantial bets with bookmakers. The bookmakers were induced to accept these bets without further inquiry by the falsehoods told by the appellants, who never intended to meet their losses if these were substantial.

LORD PARKER, C.J., said that it was contended that it was necessary in any charge under s. 17 to show that money had been won by fraud as opposed to obtained by fraud. The winning, it was said, must have been through some fraud in the play, the gamble or the sport. For example, it was said that fraud in inducing bookmakers to accept bets, as here, by pretending to act for other people, acting in a false name, and with no intention of paying losses, was not a fraud in wagering; but that there must be some fraud in the race itself. That was a view which had been taken by certain of the text-books, in particular Russell on Crime, 11th ed. (1958), pp. 1373 to 1376. But it had been held in *R.* v. *Leon* [1945] 1 K.B. 136 that it was enough if there was fraud in the actual wagering, and the court had no reason to think that that case was wrongly decided. In the present case it was abundantly clear, if one looked at the moment when these bets were placed, that the appellants were fraudulently representing, and continuing the representation, that they were acting for a number of men, thus inducing the bookmakers to accept their bets without further inquiry; and also that at the time when they placed their bets they had no intention of paying losses. That being so, there was clearly a fraud in wagering within the principle laid down in *Leon's* case, and the appeals on that ground must fail. Appeals dismissed.

APPEARANCES: *G. S. Hill, N. R. Blaker* (*Registrar, Court of Criminal Appeal*); *Michael Lee* (*W. Bradly Trimmer & Son*, Alton, Hants).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] **[1 W.L.R. 244**

NOTES AND NEWS

Miscellaneous

CHESTER AND NORTH WALES LAW SOCIETY

The seventy-fourth annual general meeting of the Chester and North Wales Incorporated Law Society was held in the Council Chamber, Town Hall, Chester, on Thursday, 12th February, 1959, when fifty-three members were present. Officers for the ensuing year were appointed as follows: President—Mr. E. A. Harris, of Shotton; Vice-President—Mr. A. R. Whittingham, of Nantwich; Hon. Treasurer—Mr. H. L. Birch, of Chester; and Hon. Secretary—Mr. J. C. Blake, of Chester. The following were elected to serve on the committee in place of the four retiring members: Mr. T. Spencer Lea, of Chester; Mr. H. Charlesworth, of Sandbach; Mr. Gwilym P. Griffiths, of Holywell; and Mr. Peter Davies, of Abergele.

The annual dinner was held on the same evening.

A NEW HENRY CECIL

An adaptation of Henry Cecil's latest comedy-thriller novel "Settled out of Court" will be broadcast as a Home Service Saturday Night Theatre production on 14th March at 9.15 p.m.

INNER TEMPLE

Sir Newnham Arthur Worley, Chief Justice of Bermuda and former President, East African Court of Appeal, has been elected an honorary Master of the Bench.

OBITUARY

MR. H. M. BLACKWELL

Mr. Herbert Montague Blackwell, solicitor, of Uxbridge, died on 21st February, aged 72. He was admitted in 1909.

MR. W. A. KAY

Mr. William Arthur Kay, solicitor, of York, died on 21st February, aged 53. He was admitted in 1922.

MR. R. STONE

Mr. Roland Stone, solicitor, of Weston-super-Mare, died on 24th February, aged 78. He was admitted in 1904.

Wills and Bequests

Mr. Vincent Thompson, solicitor, of Exeter, left £46,880 (£46,607 net).

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